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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

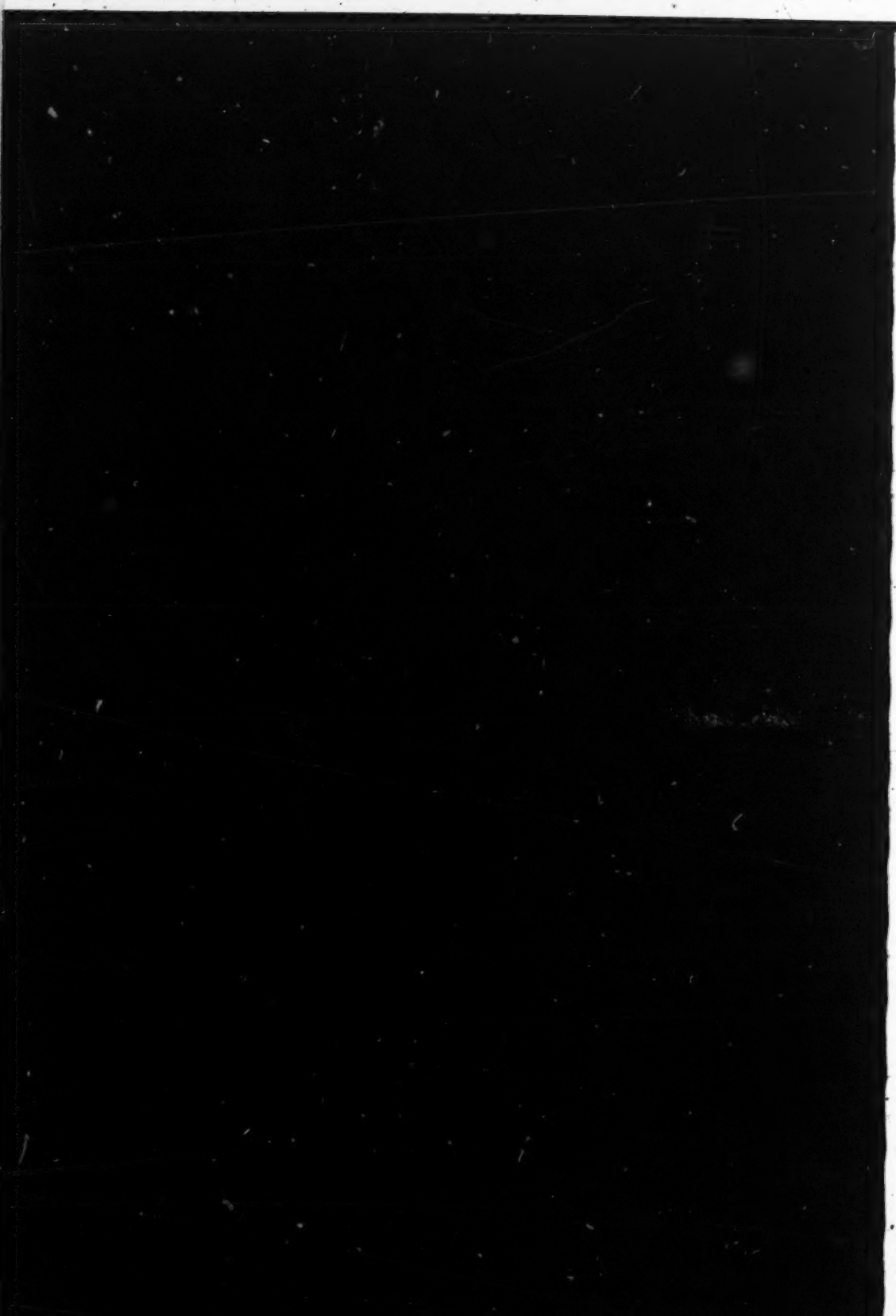
—against—

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BERNARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI—FILED JULY 22, 1971
CERTIORARI GRANTED—OCTOBER 25, 1971



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Relevant Docket Entries

May 13, 1966	—	Filed petition and record on removal including complaint
May 20, 1966	—	Filed plaintiff's interrogatories
May 26, 1966	—	Filed defendant's answer
June 2, 1966	—	Filed defendant's answer to Interrogatory No. 1
July 11, 1966	—	Filed defendant's answer to Interrogatory No. 2
August 14, 1967	—	Filed defendant's answer to interrogatories dated June 1, 1967
January 30, 1969	—	Filed defendant and third-party plaintiff's third-party complaint against Erie Lackawanna Railroad Company
August 26, 1969	—	Filed third-party defendant's answer to third-party complaint
January 14, 1970	—	Filed amended answer of defendant
April 30, 1970	—	Filed Judgment #70670 in the sum of $200,000 in favor of plaintiff and against Atlantic Coast Line Railroad Company, defendant, with costs
June 1, 1970	—	Filed notice of appeal of defendant and third-party plaintiff Atlantic Coast Line Railroad Company from judgment in favor of plaintiff
July 2, 1970	—	Filed third-party plaintiff's affidavit and notice of motion for an order setting

		aside verdict of jury against defendant Atlantic Coast Line Railroad Company and for a new trial dated May 8, 1970
July 2, 1970	—	Filed affidavit of Lloyd W. Roberson, attorney for third-party defendant, in opposition to notice of motion dated May 8, 1970
July 2, 1970	—	Filed third-party defendant's affidavit and notice of motion for an order to dismiss third-party complaint, set aside verdict in favor of plaintiff and against defendant and for a new trial dated April 27, 1970
July 2, 1970	—	Filed Opinion #36934 by Cooper, J. dated July 2, 1970 denying motions of defendant and third-party defendant to set aside the verdict of plaintiff on various grounds and dismissing claim of third-party plaintiff Atlantic against third-party defendant Erie for contribution as a matter of law
July 17, 1970	—	Filed Final Judgment in favor of Third Party Defendant and against Third Party Plaintiff
July 20, 1970	—	Filed amended notice of appeal of defendant Atlantic from order entered in this action in favor of Erie, third-party defendant, against Atlantic on July 2, 1970 dismissing the third-party complaint and the judgment entered thereon July 17, 1970

June 15, 1971	—	Filed opinion and judgment of the Court of Appeals affirming the District Court's judgments against defendant and third party plaintiff
July 22, 1971	—	Filed Petition for Writ of Certiorari by Atlantic Coast Line Railroad Company with the Supreme Court of the United States
August 22, 1971	—	Filed Brief for Respondent Erie Lackawanna Railroad Company in Opposition with the Supreme Court of the United States
October 26, 1971	—	Petition for Certiorari granted by the Supreme Court of the United States

Petition for Removal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

The petition of Atlantic Coast Line Railroad Company respectfully shows to this Court and alleges:

First: That your petitioner is the defendant in the above action which was instituted in the Supreme Court of the State of New York, County of New York, on May 5, 1966 by the service of a summons and complaint. Attached hereto and marked Exhibits "A" and "B", respectively, are copies of said summons and complaint. That less than twenty days have elapsed since the service of said summons and complaint.

Second: Upon information and belief, the plaintiff, as appears from the summons herein, resides at 504 3rd Avenue, Lyndhurst, New Jersey and is a citizen and resident of the State of New Jersey. The plaintiff is not an employee of defendant. According to Paragraph Sixth of the Complaint, he is an employee of the Erie Lackawanna Railroad Company.

Third: That your petitioner was at the time of the commencement of this action and still is a corporation organized and existing under and by virtue of the laws of the State of Virginia and is a citizen and resident of that State. It has its principal place of business at 500 Water

Street, Jacksonville, Florida 32202. It is not incorporated in the State of New York, nor does it have its principal place of business in the State of New York.

Fourth: That this is a civil action at law now pending in the Supreme Court of the State of New York, County of New York, and was brought by the plaintiff Theodore Benazet to recover the sum of $135,000 for personal injuries said to have been sustained by him on July 30, 1964 while working aboard a car float in the Hudson River between New York and New Jersey, which were caused by alleged defective braking equipment aboard defendant's freight car ACL 28224.

Fifth: That your petitioner desires to remove this suit from the Supreme Court of the State of New York, County of New York, to the United States District Court for the Southern District of New York in accordance with the provisions of Title 28 United States Code, Sections 1441 and 1446, regulating the removal of cases from state courts.

Sixth; That your petitioner has made and hereby offers in this Court its bond with good and sufficient security conditioned that it as such defendant will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that this cause of action was not removable or was improperly removed.

Wherefore your petitioner prays that this petition and bond herewith submitted be accepted as good and sufficient security and that the said action be removed to this Court from the Supreme Court of the State of New York, County

of New York, and upon the filing of this petition and bond herein and service of a copy thereof upon plaintiff's attorneys, a copy of the petition be filed with the Clerk of the Supreme Court of the State of New York, County of New York, and that said Court proceed no further therein unless the case be remanded.

Dated: New York, N. Y.
May 12, 1966

ATLANTIC COAST LINE RAILROAD COMPANY

By: FRANCIS J. PRIMOSCH /s/
Assistant Vice President

Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[CAPTION OMITTED]

Plaintiff, complaining of the defendant, by Bromsen & Gammerman, his attorneys, respectfully alleges:

First: On information and belief, at all times herein mentioned, the defendant was a railroad corporation organized and existing under and by virtue of the laws of the State of Virginia.

Second: On information and belief, at all times herein mentioned, defendant has been and still is doing business in the County, City and State of New York.

Third: At all times herein mentioned the defendant has a principal place of business in the County, City and State of New York.

Fourth: At all times herein mentioned the defendant was and now is a common carrier by rail engaged in interstate commerce between different states in the United States.

Fifth: At all times herein mentioned defendant owned a certain railroad freight car designated ACL 28244.

Sixth: At all times herein mentioned plaintiff was and still is an employee of the Erie Lackawanna Railroad Company.

Seventh: On or about July 30, 1964, while plaintiff was working aboard a car float in the Hudson River, between the States of New York and New Jersey, he was caused to be hurt and injured by and because of defective braking equipment maintained aboard defendant's Car 28244, and because of the negligence of the defendant, and he thereby sustained severe and painful injuries.

Eighth: Said accident and the injuries resulting to plaintiff therefrom were solely the result of the negligence of defendant, with no negligence on the part of plaintiff contributing thereto.

Ninth: Defendant was negligent in that, on information and belief, it maintained on its Car 28244, defective braking equipment; in that it failed to properly repair and/or inspect said braking equipment; in that it delivered said car, or caused said car to be delivered, to the Erie-Lackawanna Railroad Company with braking equipment which was maintained and/or repaired in a defective condition; in that it failed to give notice or warning to plaintiff or to the Erie-Lackawanna Railroad Company, (plaintiff's employer) of the defective and dangerous condition of the braking equipment on said car, and in that it failed to take other necessary precautions to prevent the accident.

Tenth: By reason of the premises plaintiff was severely and seriously injured; suffered and will continue in the

future to suffer pain and injury; has become sick, sore, lame and disabled, and on information and belief will be permanently injured; has lost and will lose in the future sums of money which he otherwise would have earned; has been compelled to spend sums of money and incur liability for medical treatment and medicine; and, on information and belief, will incur such expenses in the future.

Eleventh: By reason of the premises, plaintiff has been damaged in the sum of $135,000.00.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $135,000.00, together with the costs and disbursements of this action.

BROMSEN & GAMMERMAN
Attorneys for Plaintiff
450 Seventh Avenue
New York, New York 10001

Defendant's Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Defendant by Carter, Ledyard & Milburn its attorneys answering the complaint herein alleges:

First: Denies each and every allegation contained in paragraphs Second and Third of the complaint except admits that at all of the times therein mentioned it maintained offices in the City, County and State of New York.

Second: Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph Sixth of the complaint.

Third: Upon information and belief denies each and every allegation contained in paragraphs Seventh, Eighth, Ninth, Tenth and Eleventh of the complaint.

WHEREFORE defendant demands judgment that the complaint be dismissed together with the costs and disbursements of this action.

Dated: New York, N. Y.
May 25, 1966

CARTER, LEDYARD & MILBURN

By /s/ J. P. ALLEE
A Member of the Firm
Attorneys for Defendant
Office & P. O. Address
2 Wall Street
New York, New York 10005

Defendant's and Third-Party Plaintiff's Complaint Against Third-Party Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

1. Plaintiff Theodore Benazet has filed against defendant Atlantic Coast Line Railroad Company a complaint, a copy of which is hereto attached as Exhibit "A".

2. At all of the times mentioned in said complaint, defendant and third-party plaintiff was the owner of car ACL 28244 referred to in said complaint in which it is claimed that said defendant and third-party plaintiff was negligent in that it maintained on said car defective braking equipment; failed to properly repair and/or inspect said braking equipment; delivered said car, or caused said car to be delivered to Erie Lackawanna Railroad Company with braking equipment which was maintained and/or repaired in a defective condition; failed to give notice or warning to plaintiff or to Erie Lackawanna Railroad Company (plaintiff's employer) of the defective and dangerous condition of the braking equipment in said car and that it failed to take other necessary precautions to prevent the accident which resulted in injury to said plaintiff on July 30, 1964.

3. Upon information and belief the last time prior to July 30, 1964 the said car ACL 28244 was in the possession of defendant and third-party plaintiff was on June 1, 1964.

Between that date and July 27, 1964, the date on which said car was delivered to Erie Lackawanna Railroad Company, it had been in the possession of and operated over the lines of approximately seven different railroads in different parts of the country.

4. That it was the duty of each and every railroad which moved said car over its line, including third-party defendant Erie Lackawanna Railroad Company, to make an inspection of the brakes and braking equipment on car ACL 28244 before accepting delivery of said car from a connecting carrier.

5. Upon information and belief the third-party defendant Erie Lackawanna Railroad Company between July 27, 1964 and July 30, 1964, while said car ACL 28244 was in its possession and under its control, did not make any inspection of the brakes or braking equipment on said car although it had been moved from the point where it received said car from the connecting carrier, on to Car Float 50 on the Hudson River at or near its North Yard, Jersey City, New Jersey.

6. That the failure of the third-party defendant Erie Lackawanna Railroad Company to inspect the brakes and braking equipment on car ACL 28244 after receiving it from the connecting carrier and prior to loading it on Car Float 50 on July 30, 1964 was the proximate cause of the injury sustained by plaintiff on that day.

WHEREFORE defendant and third-party plaintiff, Atlantic Coast Line Railroad Company, demands judgment against

third-party defendant, Erie Lackawanna Railroad Company, for all sums that may be adjudged against the defendant Atlantic Coast Line Railroad Company or, in the alternative, that the said defendant and third-party plaintiff be entitled to judgment against the third-party defendant for contribution as a joint tortfeasor for any sum that may be adjudged against defendant, Atlantic Coast Line Railroad Company, in favor of plaintiff, Theodore Benazet.

Dated: New York, N. Y.
December 16, 1968

CARTER, LEDYARD & MILBURN

By FRANCIS M. ELLIS
A Member of the Firm
Attorneys for Atlantic Coast Line Railroad Company, Third-Party Plaintiff

Third-Party Defendant's Answer to Third-Party Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Third party defendant, by its attorney, Lloyd W. Roberson, Esq., answers the third party complaint as follows:

First: Denies having any knowledge or information sufficient to form a belief as to each and every allegation contained in that paragraph designated "1" of the third party complaint.

Second: Denies having any knowledge or information sufficient to form a belief as to each and every allegation contained in that paragraph designated "2" of the third party complaint except admits that the claims of plaintiff alleged in paragraph "2" of the third party complaint are contained in the copy of the complaint annexed to the third party complaint served by the third party plaintiff on the third party defendant.

Third: Denies having any knowledge or information sufficient to form a belief as to each and every allegation contained in that paragraph designated "3" of the third party complaint.

Fourth: Denies having any knowledge or information sufficient to form a belief as to each and every allegation

contained in that paragraph designated "4" of the third party complaint and states that the allegations of paragraph "4" of the third party complaint call for conclusions of law, which the third party defendant respectfully refers to the court.

Fifth: Denies each and every allegation contained in that paragraph designated "5" of the third party complaint.

Sixth: Denies each and every allegation contained in that paragraph designated "6" of the third party complaint.

FIRST SEPARATE AND COMPLETE DEFENSE

If there was any incident or accident, injury or damages as alleged by plaintiff and third party plaintiff, such incident or accident, injury and damages were caused solely by the negligence of the plaintiff and third party plaintiff.

SECOND SEPARATE AND COMPLETE DEFENSE

The commencement of the action by plaintiff was commenced more than two (2) years after the occurrence of the incident complained of in the plaintiff's Statement of Claim, and plaintiff is barred from maintaining such action.

THIRD SEPARATE AND COMPLETE DEFENSE

If there was any incident or accident, injury or damages as alleged by plaintiff and third party defendant, such incident or accident, injury and damages were not caused by defendant but were caused solely by the acts and negligence

of the plaintiff and of the third party plaintiff and of persons and entities other than defendant and for whom defendant was not responsible.

First Separate and Partial Defense

If there was any incident or accident, injury or damages as alleged by plaintiff and third party plaintiff such incident or accident, injury and damages were contributed to by the negligence of the plaintiff and third party plaintiff.

Second Separate and Partial Defense

If there were any injuries or damages as alleged by plaintiff, plaintiff did not mitigate or attempt to mitigate his damages.

Third Separate and Partial Defense

If there was any incident or accident, injury or damages as alleged by plaintiff and third party plaintiff, such incident or accident, injury and damages were caused by the active acts and active negligence of the plaintiff and of persons and entities other than plaintiff including the defendant and third party plaintiff Atlantic Coast Line Railroad Company.

Wherefore, third party defendant, Erie Lackawanna Railway Company, successor by merger to Erie Lackawanna Railroad Company demands judgment dismissing the third party complaint together with costs and disbursements of this action.

Dated: New York, New York
February 27, 1969

/s/ LLOYD W. ROBERSON
Lloyd W. Roberson
Attorney for Third Party Defendant
Erie Lackawanna Railway Company
140 Cedar Street
New York, New York 10006
BArclay 7-2500

[To all attorneys of record]

Amended Answer of Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION.

Fourth: Upon information and belief that the said plaintiff did not exercise the proper degree of care for his own safety in that he failed to note the alleged rotted condition of the footboard on freight car ACL 28244 on July 30, 1964 while applying the brake on said car after it had been loaded on car float 50 on the Hudson River at or near North Yard of Erie Lackawanna Railroad Company, Jersey City, New Jersey, and said contributory negligence on his part was the proximate cause of the injuries sustained by him.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION.

Fifth: At all times mentioned in the complaint defendant was the owner of freight car ACL 28244.

Sixth: Upon information and belief, the last time prior to July 30, 1964 said car ACL 28244 was in the possession of defendant and third-party plaintiff was on June 4, 1964. Between that date and July 27, 1964, the date on which said car was delivered to Erie Lackawanna Railroad Com-

pany, it had been in the possession of and operated over the lines of approximately seven different railroads in different parts of the country.

Seventh: Upon information and belief, the Inter-Change Rules of Association of American Railroads, Operations and Maintenance Department, Mechanical Division, effective at all of the times mentioned in the complaint, provide as follows:

"Care of Foreign Freight Cars

"Rule 1. (a) Each railroad is responsible for the condition of all cars on its line, and must give to all equal care as to inspection and lubrication."

Eighth: Upon information and belief, it was the duty of each and every railroad which moved said car over its line, including third-party defendant Erie Lackawanna Railroad Company, to make an inspection of the brakes and braking equipment on car ACL 28244 before accepting delivery of said car from a connecting carrier.

Ninth: Upon information and belief, third-party defendant Erie Lackawanna Railroad Company between July 27, 1964 and July 30, 1964 while said car ACL 28244 was in its posssession and under its control did not make any inspection of the brakes or braking equipment on said car, although it had been moved from the point where it received said car from its connecting carrier on to car float 50 on the Hudson River at or near its North Yard, Jersey City, New Jersey.

Tenth: That the failure of the third-party defendant Erie Lackawanna Railroad Company to inspect the brakes and braking equipment on car ACL 28244 after receiving it from its connecting carrier and prior to loading it on car float 50 on July 30, 1964 was the proximate cause of the injury sustained by plaintiff on that day.

WHEREFORE, defendant demands judgment that the complaint be dismissed as to it or, in the alternative, that defendant and third-party plaintiff Atlantic Coast Line Railroad Company demands judgment against third-party defendant Erie Lackawanna Railroad Company for all sums that may be adjudged against defendant Atlantic Coast Line Railroad Company or that defendant and third-party plaintiff be entitled to judgment against the third-party defendant for contribution as a joint tort-feasor for any sum that may be adjudged against defendant Atlantic Coast Line Railroad Company in favor of plaintiff Theodore Benazet.

Dated: June 20, 1969
New York, N. Y.

CARTER, LEDYARD & MILBURN

By JAMES J. MENNIS
Attorneys for Atlantic Coast Line Railroad Company
Defendant and Third-Party Plaintiff

Excerpts From Transcript of Trial

GEORGE RIEDINGER—*Cross*

* * * * *

Q. Now, between the defective car and where Mr. Benazet was, how many railroad tracks were there? A. Well, the situation where these floats are, you got two tracks, one on the north side and one on the south side. The one on the north side, the center track [75] of the float branches off this track into the center. When they load a loaded float in this condition they always load the north side of the float first, and use the center track.

After they get the cars on the center track, they will make their cut, pull up, throw the switch and then come in on the outside track, and load that side.

Q. This car float was floating in the water, wasn't it? A. Yes, sir.

Q. And this was the water part of the New York bay? A. That's right.

Q. And just so that the jury is informed, the float bridge is really a type of float that is able to rise up and down with car tracks going up or over it so as to connect to the car floats, so as to take the railroad cars from the land to the float or from the float to the land, is that right? A. That is right. That's what I explained yesterday, due to the aprons, they regulate the aprons. The bridge operator regulates the aprons of the bridge according to the tides of the river. If it is a hightide he can raise the aprons up. If it is a low tide, he can lower the aprons. As a float is being pushed into the [76] bridge with the tug, the bridge operator operates the apron of the float bridge in order to make the connections.

* * * * *

[102] GUSTAV FALLER, called as a witness by the plaintiff, having been first duly sworn; testified as follows:

The Court: Mr. Witness, I didn't hear your name; please speak loudly so that we can all hear your testimony. Would you give me your name again?

The Witness: Gustav Faller.

[103] The Court: Thank you.

Direct Examination by Mr. Altier:

Q. I understand you are retired, is that correct? A. That is correct.

Q. What was your occupation before you retired? A. I was a railway car inspector.

Q. For what company were you employed, sir? A. New York Central Railroad.

Q. How long had you been employed by the New York Central Railroad? A. (No response.)

Q. When did you first go with them? A. 1927, May 10.

Q. After you were with them for a while did there come a time when you went with the Car Inspectors Service? A. Yes, sir.

Q. When you became a car inspector did you go through an apprenticeship and training? A. We were trained on the job.

Q. How long a period of time did that training take before you got fully qualified as a car inspector? A. Four years.

Q. After you became qualified as a car inspector did you act in that capacity for your company? [104] A. Yes, sir.

Q. Did there come a time subsequent to that when you became a supervisor of car inspectors? A. Yes, sir.

Q. When was that? A. That was 1949.

Q. And then, sir, in your capacity as a supervisor of inspectors, can you tell us how many inspectors would be under your jurisdiction or under your direct supervision from time to time? A. In the yards, when I was supervisor of yard forces, we had as high as 40 or 50 men, and on repair tracks supervision I had as high as 50 repair men.

Q. Would your function there, sir, be in a supervisory capacity? A. Yes, sir.

Would you be directly responsible for the work of these men? A. Yes, sir.

Q. Are you familiar, sir, with the standards of practice on the railroad lines on or about July 30, 1964? A. Yes, sir.

Q. Sir, I show you Plaintiff's Exhibits 2, 2A, 2B and 2C in evidence, and ask you, sir, whether or not [105] you have handled or seen or been responsible for cars of this type during your career? A. Yes, sir.

Q. How many such cars would come through your men, the men you supervise or through you during your career, or let's say during a year's period or a month's period, whichever might be easier? A. It takes a lot of arithmetic.

The Court: On an average, take any period you wish.

A. On a day, in supervising inspectors in one particular yard we run out about 300, 400 cars a day.

The Court: All right. Next question.

Q. Well, sir, are you familiar with the methods that are employed at, or about that time of inspecting the cars by an owning line? A. Yes, sir.

Q. Are you also familiar with the method and the accepted standards of investigation and inspection for a passing on line, or a foreign line, a line foreign to the car? A. Yes, sir.

Q. In the course of your work for the railroad, have you become familiar with particular stress points on [106] railroad cars of that sort? A. Yes, sir.

Q. Are you familiar with the nature of the metals as it is subjected to use on railroad lines over a period of time? A. Yes, sir.

Q. Are you familiar with the way that the conditions and the periods of time within which the conditions of wood, exposed wood on railroad trains changes? A. Yes, sir.

Q. Now, sir, you have been here since the beginning of the trial, is that correct? A. That is correct.

Q. You heard Mr. Riedinger testify and all of his testimony, is that correct? A. Yes, sir.

Q. You also heard Mr. Roberts testify and read the exhibit that was in evidence here, Plaintiff's Exhibit 1 in evidence, the repair card, is that correct? A. Yes, sir.

Q. And you have also reviewed those photographs, is that correct? A. (No response.)

Q. You have seen those photographs? [107] A. Yes.

The Court: Please, always, for the sake of the record, give the numbers even though it is repetitious.

Mr. Altier: All numbered 2, 2A, B and C.

The Court: All right.

Q. Now, I am going to ask you, sir, to assume all of the facts that were testified to concerning the footboard and I am just addressing myself to the footboard at this time. I want you to assume the testimony as was evinced by Mr. Roberts—

> The Court: I have great respect for counsel on all sides, but once in a while I must interrupt. I know what you are trying to say, but I would like to have you actually incorporate the factors that you wish to confront the witness with rather than have him tell us his estimate of their testimony.
>
> Mr. Altier: Fine, your Honor.

Q. Mr. Faller, addressing ourselves to the footboard, I want you to assume that this footboard was owned by the Atlantic Coast Line and was attached at the—at one of the ends—I don't remember which it was—of the car where the break was. Assume that that car had been in the possession of the Atlantic Coast Line on the dates as I indicated in Plaintiff's Exhibit 4, to wit—

> [108] The Court: I hope you will forgive my interfering but this is a very important question, extremely important, and we have got to know exactly what factors the witness is considering before he gives his answer.

Q. To wit, on September 4 to September 8, 1962, from 11-16-62 to 11-22-62, from 11-24 to 12-5-62, from 12-17-62 to 12-20-62, and then at the end of 1963, came into the ACL possession for a month, a little over a month, from Novem-

ber 11, 1963, to December 13, 1963, and then it came into the ACL's possession on 6-1-64,—I am sorry, I skipped.

Then it came into their possession for two months in the beginning of 1964, namely from January 10, 1964, until March 10, 1964.

And then again into the owner line, this railroad car returned on May 9, 1964, and May 10, 1964.

And then again this owned vehicle, freight car, came into the possession of the Atlantic Coast Line on June 1, 1964, to June 4, 1964.

I want you to assume that on July 30, less than two months later, that car went through seven other lines and then came into the possession of the Erie Lackawanna Railroad, and that on that day, at about noon, Ted Benazet climbed up a ladder, while applying that hand brake the [109] footboard gave away out from underneath his right leg, his weight went back upon the hand brake, he pulled—when he pulled against the hand brake as his weight went back the hand brake assembly came down and Ted Benazet went down to the deck of a float whereon that car was stationary at the time of that accident.

I want you to assume that within a very brief period of time thereafter the witness, Mr. Riedinger, came down to the scene of that accident, looked up, saw that brake assembly dangling over the footboard, that on that same day, or within a 24-hour period of time, on a nice day, the photographs, 2, 2A, 2B and 2C were taken, as you see them there; I want you to assume that Roberts did a close inspection of the footboard as shown in those photographs, that that inspection demonstrated one-quarter inches of rot into the top of the board which board was an inch and a quarter in

thickness; in other words, that Roberts observed 20 per cent rot depth of the width of that board; I want you to further assume that Riedinger also investigated, he didn't recall, however, the condition of the footboard other than to say it was broken, but he did observe minutely the condition of the fissure and the broken ends of the brake bracket.

He described them, that on each of the brake [110] brackets there were the remnants of a one-half inch spot, electric weld; and at that point, where you observe the break, the metal was brighter in color than the rest of the metal of the bracket which, at the point of the break, was rusted.

The Court: The rest of the weld of the bracket was such.

Mr. Altier: Was such. And also the 2½ additional inches of the brake were such.

Q. (continuing) And this long question I want answered yes or no. Assuming all of those facts, can you, with a reasonable degree of professional certainty, of the certainty gathered through your years of experience, can you, with a reasonable degree of certainty, tell us what the age of that rotted condition on the footboard was?

Mr. Mennis: At this point, your Honor, I would like to object, first to the fact that although this car was owned by the Atlantic Coast Line Railroad Company, there has been no evidence that that wooden footboard was on that car during all of the

period mentioned; and on the further ground that I don't think he has a sufficient basis, as far as those brackets are concerned, on which to base an opinion.

The Court: Objection overruled.

[111] Mr. Roberson: Your Honor, I object to the part that makes an assumption that Mr. Roberts made a close inspection, and my recollection is that Mr. Roberts gave testimony he didn't make a close inspection, that he saw that the board was broken and it was rotted, and that he didn't therefore, proceed with a closer inspection.

Mr. Altier: If I may, your Honor, amend my question.

Q. Mr. Faller, change that assumption and eliminate from it, so that we don't—just eliminate from that my words "close inspection"—just that he inspected it and found it rotted to a depth, and everything else is the same, all right?

The Court: Now have you got all those factors in your mind, Mr. Witness?

The Witness: Yes.

The Court: Do you remember the question?

The Witness: I remember the question.

The Court: What is your answer, yes or no?

The Witness: Yes, I can determine but I will have—

The Court: The answer is yes?

The Witness: Yes.

The Court: Next question.

[112] Q. Sir, can you tell us whether the rotting and deterioration began, in your opinion, on the footboard? A. May I examine this photo?

The Court: Certainly, you may examine anything you wish.

(Witness examines photo.)

The Witness: I am ready.

Q. How long sir? A. At least two years.
Q. On what do you base that opinion?

The Court: Now you may answer more than yes or no, of course. Now the jury wants to know, and so does the job, why do you say two years? Take your time and explain it to us.

The Witness: First I'm taking into consideration what I see in the photo, that the leading edge of the footboard is weatherbeaten. This don't happen overnight or over a short period of time.

Two: At the split bolts—

The Court: At the what?

The Witness: Split bolts. Should I explain that to you?

The Court: Yes.

The Witness: By law of Congress it has been [113] established as to the size and thickness of the width of these bolts, and because it is a safety appliance, being wood, the man depends upon stepping upon it and it is secured by bolts. It could split at these bolt holes, so through the facing edge of the

board, for example, if this was the board, we place two split bolts through the entire thing to lock that as an integral part, so it will not split, and these are split boards.

Now, here at the split bolts that is evidence of rusting and rotting.

Q. Which photo are you referring to, sir? A. This is 2.
Q. Would you take a—

The Court: May I ask your indulgence?

Mr. Altier: Surely.

The Court: Let him finish, and then you fill in any gaps or anything you wish, but he is now building up and he is coming to a crescendo here.

A. Now, the left-hand split bolt, it indicates there that there is rusting and decay. Now rust builds on these bolts and expands. Rust will always expand, and it has split this board from the split bolt to the right side to the support bracket.

Now, at the failure on the right-hand side—

[114] Q. I am sorry, I missed that word. A. At the failure of the board itself on the righthand side there appears to be the same type of a crack which originates on the split bolt, and the split bolt on this side is inside of the support bracket. There is two support brackets by law, and two bolts support this footboard. The split bolt on the left-hand corner is outside of the bracket. The split bolt on the right-hand side is inside the bracket. The failure here shows definitely that it started at the split bolt, the point where corrosion and rust sets in, and broke off, and is still hanging there.

There are two holes which are decay or rot holes in that trailing edge to the right of the bracket, and this is what I base my opinion on inasmuch as it takes several years for this condition to exist, and is visible, inasmuch as those cracks are visible and those two holes in the end of the footboard that is broken.

Q. Sir, the quarter inch depth of decay, is that relevant to your evaluation or your estimation of time? A. It is not visible but what is visible is the split, where it starts, and the decay holes in here.

Q. No, sir. Listen to my question now. I said is the fact of the—that was testified—namely the quarter inch depth of rot at the top of the board, is [115] that a factor that you use in estimating the time of this decay to be two years? A. Yes, sir.

Q. Now, you have stated that you are familiar with the procedure of a receiving owning line in receiving a car of this kind, correct? A. (Witness nods.)

Q. You must answer. A. Yes, sir.

Q. Would you describe the examination that is the accepted standard examination of a receiving line during 1962-63 and 1964, what kind of examination do they conduct, an inspection? It is standard to conduct, by an owning line, concerning the brake, footboard and brake assembly?

The Court: I am sorry, but you started out with the past tense and then you wound up in the present tense.

Mr. Altier: I will rephrase the question.

Q. Would you state to the Court and the jury what the accepted test consisted of during 1962, 1963, and 1964, relating, said inspection being made by a receiving, owning

line, said inspection being made to the brake assembly and brake footboard? [116] A. (No response.)

Q. How do they do it? The accepted method. A. May I ask a question?

The Court: You certainly may if you think it will help you to understand the question.

The Witness: Yes, sir. We have what is known as an interchange, the cars are interchanged from one railroad to another.

Mr. Roberson: Your Honor, the expression "we" I am not quite certain what he is referring to.

The Witness: In the railroad industry.

The Court: Yes.

The Witness: The expression in the railroad industry, as to the accepting cars of one railroad to another is an interchange.

If you are trying to ask me what our practices were in accepting our own cars back in interchange, what the inspection consisted of, is this what you want to know?

Q. That is exactly what I want to know. A. Well, primarily all the inspections are identical. When we hit our own home cars we look for cardable damage, cardable damages is an expression where someone is responsible for damages to your equipment that has not been repaired or reported.

[117] We look for these defects to protect our own company, and we also look for normal excessive wear that might, in the near future, cause our car to be cut out. We like to send them to our own shops and repair them. The reason for this is on repair tracks we open the doors, the cars are empty, we examine the interior, sometimes we re-

pair the flooring, the side lining to keep the cars in good condition.

There is a type of repair and maintenance that is not normally done on other railroads, but all the inspections are the same.

Now, we hit cars with wooden footboards, or any exposing wood, very few running boards today, the wooden boards on the side, the destination cardboards which are on the side doors of the cars, we repair them and replace them, especially when there is rot and decay and especially on the footboards because this is a safety appliance and when you work on a railroad, whether the man is a track man or a supervisor, you are one big family and we don't normally quit our jobs and move around. We stay on the job until our days are done and you get to know all these men. We would feel terrible if we had missed something and a man is injured anywhere.

But the United States had passed laws protecting [118] men, and make this mandatory, that these boards have got to be in first class condition.

Q. Mr. Faller, when you inspected, and you were the receiving line, when you are inspecting the footboard, what is the accepted procedure, in 1963, 1964? A. When it shows decay—

The Court: No, no. What would an inspector do in those years when he inspected such a car?

A. When you inspect such a car, you see decay as this, you get up on the board and examine it closely. Now, that is one of the few times when you really climb a ladder, because normally the car inspector is on the ground.

The Court: Would they climb a ladder?
The Witness: Yes, I would.

The Court: Wait a minute. That is the point. Would you climb the ladder even though you had no reason to believe there was anything wrong with it?

The Witness: Oh, no.

The Court: Well, that is what he is asking you.

The Witness: That is what I said. If I see a board in this condition, I wouldn't climb the ladder. I could see it from here. I could see it from the ground. [119] It is a small photo. This is visible from the ground. You are about 10 feet away from it when you see it.

The Court: You better straighten it out.

Mr. Altier: Yes.

Q. Mr. Faller, when you are on a receiving line and you are investigating and you are a car inspector on the receiving line, and you are now going to look at the safety appliances on that car, do you look at it from down here or do you climb the ladder and look right at it? A. If I am making a safety appliance check I will climb the ladder.

Q. Is that standard practice, to climb that ladder when you are on a receiving line? When you are a receiving owner—maybe I am using the wrong phrase—and you are going to look at the brake, isn't it standard practice— A. Yes, you would climb the ladder to look at the brake.

Q. Is it also standard practice to climb the ladder and look at the footboard? A. When you are up there you will.

The Court: I am afraid that the witness has not made himself too clear, at least to me.

Mr. Altier: I will try to straighten it out.

[120] *By the Court:*

Q. What we want you to tell us is what was the regular inspection in those years of a freight car which was re-

ceived by a line from another line? That's the first question. What would he do if his attention wasn't called to anything in particular? Here comes a railroad freight car, what does he do when he inspects it? A. He makes—

Q. In 1963 and 1964. A. He makes what we consider a normal—

Mr. Roberson: Your Honor, just an objection by way of clarification, because—

The Court: Well, you straighten it out later. I want his answer to this question now.

Mr. Roberson: I am not sure whether he is talking about receiving it in the regular course—

The Court: Just a moment. I have got his mind concentrated I think on what we are after, and that is to find out what would be the ordinary inspection by a receiving line of a car back in 1963-1964. Just what was the routine, that's all I want to know.

The Witness: We would make a physical inspection of the exterior of the car.

Q. What would it be? How did you go about it? [121] A. Come up to the end of the car, examine the ladders, you would look up.

Q. Yes, sir. A. There is an end ladder. If you are on the "B" end of the car which indicates that that is the brake end of the car, you would give that a visual examination, you would examine the extending and the running board. You look for any defects that might be indicated from the ground level.

Q. Right. A. You walk down the side of the car, observe the side ladder, you observe the doors. Before you leave the side ladders you bend down and examine the under gearing, the couplers, the release levers, etc.

You would walk up to the door of the car, make sure that it was locked and sealed or wired.

And you would continue on and make the same identical inspection on the other end of the car.

The Court: Very well. Now you can ask any questions along those lines you want where a receiving car owner and all the rest of it are involved.

By Mr. Altier:

Q. Would, in your opinion, the decayed condition be apparent or be noticeable by that routine inspection [122] conducted some two months prior to this accident? A. Yes, sir.

Q. What would be the accepted practice in seeing a board of that size from the ground, what would have been the accepted practice in the industry in early June 1964, what should that inspector have done following ordinary practice? A. Card the car, put a card on the side of the car marked "bad order," notify the yard master to have the car switched out for movement to repair track. We would indicate on a car what our exceptions were.

Q. In order to do that would you climb the ladder and look at it in detail? A. Well, when we notice this condition, yes.

Q. And is that standard practice when you notice that condition, is it standard practice in the industry to climb the ladder and look at the condition? A. Yes.

The Court: You said "if."

Q. Was it in 1962, 1963 and 1964 the standard practice when you noticed such a condition from the ground to climb the ladder and take a good look at it? A. Yes.

The Court: Don't forget, we have gone to the [123] moon since that year, right? You don't know what the present method is, whether they have the same or different equipment for inspection. Very well.

Q. Are there, sir, on the brake assembly, certain stress points? A. Yes, sir.

Q. And would you tell the Court and the jury what those stress points are in the metal on that brake assembly? A. At the bends.

Q. Can you observe there where that brake assembly broke, the brackets broke, from the photographs? A. Yes, sir.

Q. And where did the break occur?

The Court: Now, you are looking at which exhibit?

The Witness: I am looking at 2B, your Honor.

The Court: That's right. 2B.

A. 2B is a lot clearer.

The break occurred at the first offset from where the bracket was secured to the car.

Q. Did it break at the bends? A. At the offset.

Q. Why are these called stress points? A. Well, stress points or fatigue points, you normally find fatigue cracks in this area.

[124] The Court: No, no, that still doesn't answer it. I am sorry. Why is it called stress point? Is it that there is greater stress on that?

The Witness: Yes.

The Court: Wait a minute. No one can interrupt the Judge. He has certain prerogatives, that is all I get really outside of the pleasure of the job. I am allowed to tell jokes even though they are no

good, and everybody is expected to laugh, you know. Now take it easy, please, because I am trying to follow you and I think if I follow you the jurors surely will.

By the Court:

Q. When you say stress point on a bracket, for instance, do you mean that that particular point is exerting the greatest amount of stress on that bracket? A. Yes, sir. Shall I explain that?

Q. Please do. A. This particular bracket in the trade is known as a single offset bracket. It comes down flush to the wall of the car, to the end of the car, it has one offset out and then drops down.

That bracket is supported to the car by two rivets, both sides.

The bracket assembly is bolted or riveted to [125] these two brackets which are hanging free because they are now not secured on the bottom. There is motion there.

Now, when the hand brake is wound up, this is a gear ratio brake. It is about a 5 to 1 on a gear ratio. That means if a man winds that brake up and he is applying 200 pounds pressure he is applying over a thousand pounds of pressure to this first offset, because that whole bracket pulls down. He is tightening up the brakes to keep this huge car from moving. Therefore, something has got to give, and when it stops giving then the brakes are completely set. This is what we call taking the strain on the metal, and then you wind them up tight.

And this point, coming down, is where all the fatigue cracks show, and on the exposed—where the inspector can see it.

The Court: That you made simple and clear. Very well.

By Mr. Altier:

Q. Now, the fatigue points or cracks, do they progress, in your experience, at a usual rate over a period of time? Can you estimate at what rate these— A. They grow.

Q. In your experience, are you familiar with the rate at which they grow? [126] A. It takes several years for them to become in a dangerous position, yes.

Q. How fast do they grow? A. Well, the fatigue crack starts—

Q. How fast do they grow? A. It starts at the corner of the bend and progresses across—about a half inch a year, to a point when the wear, the stress is accelerated after you get to a certain part because you are losing the strength of the metal.

The Court: In other words, at that point—

The Witness: It begins about a half inch a year, and when it gets up to three-quarters of an inch you begin your accelerating because you have lost the strength of the metal, and this is a very critical point of inspection.

The Court: And when it begins to manifest such an invasion, I presume that it then becomes less capable of resisting to the stress?

The Witness: Correct.

The Court: All right.

Q. Now, how long prior to this breaking away that we described in our hypothetical question, in your opinion, was this spotweld made? [127] A. Well, I can't see the spotweld but the spotweld was described as a half inch long, and this metal being 3 to 3½ inches wide, I'd say that from the spotweld, 50 per cent of the metal, take a year and a half

before we came up to the critical point, two years before the fracture was completed.

Q. Is it, Mr. Faller, the accepted standard practice when receiving—

The Court: Please counsel, is it, is it?

Q. In 1962 through 1964 was it the accepted practice, when receiving a car, one's own car, to particularly examine the safety appliances on that car? A. To examine the safety appliances?

Q. The safety appliances, do you examine the safety appliances? A. Yes.

Q. As a matter of fact, the ICC makes you examine them, doesn't it? A. On all cars, yes, sir.

Q. It is Federal law that says you must examine the braking system, the safety appliances, one of which is a hand brake system, isn't that correct? A. Yes, sir.

Q. So it is your duty, you must do this according [128] to Federal law, examine in detail the system, isn't that correct? A. Yes, sir.

The Court: The only one who is allowed to raise his voice is the Judge. And is that true in 1963 and 1964?

The Witness: It has always been true.

The Court: All I asked you was, was that true in 1963 and 1964?

The Witness: Yes, sir.

The Court: And the safety devices include what?

The Witness: Hand brakes, footboard, and the hand brakes or any other securements of the safety device itself.

The Court: Thank you.

Q. In your opinion, sir, would the spotweld and the fissure have been visible upon the inspection made by the receiving line on June 1, 1964? A. Would you say that again, I didn't get it. I'm sorry.

Q. In your opinion, sir, would, upon an inspection of the safety appliances by the owning line, on June 1, 1964, when it received this car into its possession, would it have disclosed the spotweld in the fissure? [129] A. Yes, sir.

Q. What was the accepted practice in June of 1964 if you discovered upon inspection such a condition, namely the spotweld and the fissure? A. (No response.)

Q. What would be the accepted practice? A. Send the car to repair track for repairs.

Q. Would it be acceptable to send that car in that condition back into interstate commerce? A. (No response.)

Q. Back onto the lines again? A. No.

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THEODORE BENAZET—*Direct*

[154] The Court: If I may interrupt you, counsel, just how did you get onto the deck of the float? See, now, we are supposed to understand it and you may be surprised at that question, but how did you actually find yourself down on the deck of the float?

The Witness: I walked down, your Honor. I walked down to the float as we were loading the cars.

Mr. Altier: I think the witness misunderstood.

Q. The Judge was inquiring how did you get—after you felt the footboard go out underneath your foot—incidentally, what foot was it that went out? A. The right foot.

The Court: See, if you don't mind, counsel, you have got to give it to us step by step, instant by instant. You had your foot on the—now you go on, I don't want to lead you. Just go on and repeat it exactly, give it to us in detail. Then what happened to your body, the movements of your body, how your body went through the air. Where did it go, on the side, how did it get down [155] there? Do you understand what I mean?

Q. You can demonstrate if you feel easier to show us with your hands or stand and tell the jury how it happened.

The Court: All right.

A. Well, I was standing on the platform and I was exerting pressure on the brake like this, using my back and knees, too, and as I was putting on as tight as it would go, all of a sudden I felt the corner of this platform give way and as it gave way and I went back the gear box went off the car and I went back in the direction like that, down on the float. Then I felt myself flying through the air and then the next time I was out and I remembered I looked up, I was laying on the floor of the float and I looked up and at about a 45-degree angle like that I could see the gear box had come off the car and fallen over the brake platform, and the corner of the brake platform was also broke off.

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ANSWERS OF DEFENDANT TO PLAINTIFF'S INTERROGATORIES

[298] Mr. Altier: In answer to interrogatory No. 2 on the sheet I read either yesterday or the day before, which was propounded by my partner, Ira Gammerman, on May 18, 1966, question 2 reads as follows:

"State what repairs were done on defendant's car ACL28244 from the 1st day of January 1961 through July 30, 1964, indicating the date and place of each repair, the nature of each repair and the name of the railroad making said repair."

In answer to that question on July 6, 1966, through an officer of the defendant Atlantic Coast Line, they answered interrogatory 2 as follows:

"Interrogatory No. 2: The following repairs were performed on car ACL28244 by Atlantic Coast Line Railroad Company on the dates and places shown below during the period February 28, 1962 through July 30, 1964.

"1. On February 28, 1962 at South Rocky Mountain, North Carolina, installed at the A and B ends of car No. two sheets of three-quarter inch plywood; on the [299] right and left sides three new sheets of three-eighth inch plywood applied. One route cardboard applied at location B end left side. Right and left doors straightened on cars.

"2. At Waycross, Georgia, on March 27th, 1962, repacked journal boxes.

"3. At Rocky Mountain, North Carolina on November 18, 1962, made in date test of air brakes in accordance with the Power Brake Law of 1958, paragraph 132.17(2)(1) filed in accordance with item 1200 of AAR Interchange Rule 101, Section B, account old date 3-27-62, WPAC.

"Brake shoes or brake shoe keys applied on right side No. 2 location and left side No. 3 location."

The repair card is not clear as to which was applied.

"Door handle straightened on left side.

"4. At Waycross, Georgia, on November 13, 1963, one pair of 33-inch multiple-wear steel wheels numbered 105 and 308 were applied at location R and L-1, removed multiple wear steel wheels numbered 46 and 5. Roller bearings numbered 53E847 and 53F82 were removed and roller bearings No. 53F47 and 58E803 were applied. Right side No. 1 location applied [300] one new brake shoe. Left side No. 3 location applied one new journal box bolt sleeve. Made in date test of air brakes. Car stenciled with old in date test dates and Southern Rail 3 14 63 and N I & NP 8/23/63"—

The Court: What do you think the jury is getting out of that? What's your point?

Mr. Altier: That these are the only repairs that they—

The Court: All right. Ask your adversary whether or not they will concede such and such repairs in such and such a way were made; that is all. Isn't that so?

Mr. Altier: Yes, sir.

Will you concede these repairs made as outlined in interrogatory No. 2 were the only repairs of which you have a record during this period of time made by the Atlantic Coast Line?

Mr. Mennis: Yes. But then there are some other repairs there that were made by other roads which are listed in those interrogatories?

The Court: Yes, but do they relate to the area of the car with which we are concerned, is all I want to know.

Mr. Mennis: They relate to the car itself, but not to the brake.

[301] The Court: Therefore, is there any purpose in it? I may not get all these points, you know. You are here to point out something to me and help me understand it. Do we need any of this, is all I am asking, other than the area with which we are concerned?

Mr. Altier: Yes, your Honor, I am afraid to say it—

The Court: Explain. Don't be afraid to say it.

Mr. Altier: Your Honor will recall the difficulty I had concerning the witness Mr.—the expert witness, Mr.—

The Court: He was brief. There is no testimony here that's been difficult. Did you ever have a real difficult witness?

Mr. Altier: I had one area of inspection that I wanted to clear up.

The Court: The kind of witness who says, "Who are you?" and "I'm not supposed to be listening—answering all this," and, you know, that kind of stuff, and, "I won't give it to you," and all that. That is a tough witness.

Mr. Altier: Right, okay. My point is, when a car hits a repair track, I don't care what the condition is, there is a certain kind of inspection that has to be done. So the relevant area here is not only is there a [302] type of inspection that is done when a car passes into interchange, not only is there another kind of inspection done when an owning line receives it, but there is, in addition to that, another kind of inspection which is performed when a car hits that repair track.

And what I am doing here is laying the foundation that this car hit the repair track; I don't care what it was. Once it hit the repair track and the ACL Line, there is a certain obligation of inspection. And that is the purpose of putting this in.

The Court: All right. Proceed in your fashion, except you will do so after lunch at 2:15.

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Mr. Altier: May I proceed, your Honor?

The Court: Please.

Mr. Altier: Your Honor, continuing to read the answer to Interrogatory 2, the record indicates—and I believe my opponent will stipulate that it indicates—that in addition to the times it was on the repair track of Defendant ACL, it was also on the repair track of Northern Pacific on August 23, 1963, and the Staten Island Rapid Transit Railway in November of 1962. At neither of those repairs was it worked on for the conditions alleged to be wrong in this case.

The Court: Very well.

Mr. Altier: In addition, your Honor—is that so?

Mr. Mennis: That is correct.

The Court: Thank you.

Mr. Roberson: Mr. Altier, can you hear the last phraseology?

The Court: Surely. Mr. Court Reporter, would you read it? Or would you want to show to counsel your last comments after he got through reading from the interrogatory.

Mr. Roberson: With reference to what is stipu-
[304] lated.

(Record read.)

Mr. Roberson: Well, I can't concede the least part because I am not clear of what the wording "it" and thereafter is saying.

The Court: Very well.

Mr. Roberson: Perhaps it can be restated or rephrased, but I am not sure the way it was stated I follow that.

Mr. Altier: The work that is done—I am sure you have a copy of this—other than at ACL Lines didn't involve the hand brake assembly or the footboard of the car in question.

The Court: Is that all right?

Mr. Roberson: That is all right, your Honor.

The Court: Fine. Thank you, Mr. Wolf.

Mr. Altier: Interrogatories propounded by me, dated June 1, 1967, are as follows:

"Interrogatory 5: State what records, if any, are kept by defendant concerning repairs made on Defendant's car ACL 28244 by railroads other than defendant."

Answer to interrogatory submitted by an officer, August 2, 1967, is as follows:

"AAR billing repair cards received from foreign [305] railroads are retained on file for a period of three years. Defendant does not have a billing repair card for car ACL 28244 during the period of three years prior to the date of the accident."

The next question is, and all the rest of the questions are propounded at the same time, as I originally indicated, and are answered at the same time:

"Interrogatory 8. State with particularity the invoice procedure of defendants concerning repairs

made by leasing railroads pertaining to defendant's car ACL 28244."

Answer to Interrogatory 8: "AAR billing repair cards are prepared for each car repaired stating the repairs made and reasons therefor in such detail as required by the AAR interchange rules and charges are assessed as provided by this code of rules. All billing repair cards covering repairs to Atlantic Coast Line Railroad cars for the month are consolidated into one monthly bill by listing on the bill only the cost of each car repaired which is submitted to us for payment with the original billing repair cards attached. Bill is audited in the accounting department and if found correct is approved for payment by draft which is drawn 30 days after the date of the bill, unless the bill is returned to the billing road prior to expiration of 30 days. We have no record of returning any Erie [306] Lackawanna car repair bill during the past three years. Approved bills became a part of a voucher record to be retained as required by Interstate Commerce Commission. Billing repair cards are detached and filed as per No. 5 above."

Now Interrogatory No. 9:

"State the date when defendant first obtained ownership of its car ACL 28244."

Answer to 9: "Defendant obtained ownership of car ACL 28244 in September 1940 as a rebuilt car."

Interrogatory 10: "State whether said car was inspected upon a regular basis. If it was so inspected, state the dates of inspection prior to plaintiffs' accident."

Answer to Interrogatory 10: "Yes. No reports available."

Interrogatory 11: "State in detail defendant's procedure for the inspect of car ACL 28244."

Answer to Interrogatory 11: "Can not answer as presently phrased."

Interrogatory 12: "State whether defendant inspected the aforesaid car when it was returned from the leasing railroads prior to plaintiff's injury."

Answer to Interrogatory 12: "Yes."

Interrogatory 13: "State whether there was [307] any other inspection made of the particular car, ACL 28244, before July 30, 1964."

Answer to Interrogatory 13: "Yes."

Interrogatory 14: "State whether there are inspection reports in existence pertaining to inspection of said car prior to July 30, 1964. With regard thereto state (a), the number of such inspections; (b), the dates of such inspection reports; (c), the location of said inspection reports; (d), the custodian of said inspection reports; (e), the contents of said inspection reports; (f), the name of the inspector or inspectors upon whose examination each report is based.

Answer to Question 14: "The only inspection reports of which defendant has knowledge are those referred to in defendant's answer to interrogatory No. 2, under date of July 6, 1966.

"Subsequent to that date the following report of repairs to ACL 28244, dated July 28, 1966 was received from W. G. Carlson, chief mechanic, officer

of Erie Lackawanna Railroad Company: 'The following repairs were made to this car on August 1, 1964, after the accident: Two new hand brake brackets applied account broken. Four securement bolts 5/8 inch and 1/2 inch applied account damaged by removal. Four new hand brakes bracket bolts applied 5/8 [308] x 2 inch account damage by removal. One new hand brake step applied account wood removed was decayed and broken. Four securement bolts 1/2 x 1 1/2 applied account damaged by removal.'

"In addition to the above records we have on file in this office car inspector's form 34 for November 21, 1962; December 4, 1962, and June 3, 1964, covering inspection of trains in which subject car was moving. While these forms are not inspection records of the individual cars they cover inspection and test of the entire train. These forms are signed by the car inspectors as shown below: N. K. Cox, William Flowers, J. W. Quinn, G. W. Alreid, deceased."

Interrogatory 18: "Has defendant received any invoice, notice, inspection report or made any payment to a leasing railroad for a welding repair made to the Ajax Brake assembly on defendants car ACL 28244?"

Answer to Interrogatory 18:

"We can not find any record or invoice, notice, inspection report or any payment to a leasing railroad for a welding repair made to Ajax Brake Assembly of our car, ACL 28244."

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[374] The Court: Let the record show that we had a conference in the robing room after the jury was excused yesterday afternoon. And I should say it lasted approximately 20 minutes, a half hour.

We met this morning to resume the conference at a quarter of ten. What is the conference about, what necessitated it?

In the first place, it must be recognized this action is predicated on common law tort. And Atlantic came forward and said, in effect, that common law tort is applicable and that if there was any contributory negligence on the part of the plaintiff, he would have to show himself absolutely free, therefore, in order to sustain his cause of action.

Requests to charge were submitted to the Court, all of which were consistent with the theory permeat-
[375] ing, in fact, saturating the entire litigation. There never was any motion from the time this case was instituted which took any opposition with regard to the cause of action being one in common law tort.

Suddenly, and without any prior notice—and surely the Court accepts counsel's explanation—Mr. Roberson, the attorney for Erie, yesterday submitted an additional request to charge. He came upon this thought and he was duty-bound to apprise us of it.

What is it that he wants? He wants us to declare that this is a maritime cause of action, certainly with respect to the claim over against him, in which event, there is no claim over. And he asks

to be allowed to step out of the case; his client should be allowed to walk home.

This despite the fact that counsel for Erie has labored hard and meticulously in cross-examination of the plaintiff's witnesses. I would say that certainly it is up to the jury, but I would say that the record would indicate that here and there he chipped away some of the effectiveness of the testimony adduced on behalf of the plaintiff, all to the benefit of Atlantic.

He had, in other words, a full opportunity to swing without hindrance at the plaintiff's cause of action. In fact, the full impact of his new request to charge, to wit, [376] the one dealing with the maritime cause of action, maritime claim, came after or just about the time that plaintiff's case was in.

Nevertheless, and without in any way holding Mr. Roberson to account, I think he did what he was duty-bound to do. The impact on all of us was definite—we couldn't brush it aside, and that goes for plaintiff as well as for Atlantic—counsel were taken aback by it, and so was the Court.

It is very easy for a Judge to say, "You can't have your cake and eat it. You came in on a common law tort, Erie, and you didn't do anything until it was too late."

That is easy to say, but actually if counsel for Erie is right, then we really have no justification to proceed in common law tort. This is not a matter of discretion; this is a matter of right. Is there jurisdiction or isn't there? It is as simple as that.

And, so, after a conference with counsel, and after reflection, and bearing in mind that none of

us are too certain as to whether or not the course we are about to announce is the best under all the circumstances—in other words, we are not as sure of it as we were when we started the trial dealing with the cause of action in common law tort—we have resolved the following: [377]

1. That, in essence, the substance of the cause of action of the claim and the defense by both Erie and Atlantic, or Atlantic as well as Erie, are in the record. Everything dealing with negligence, if any negligence there is, is in the record. Everything dealing with contributory negligence, if contributory negligence existed is before us.

What I am trying to say is that in, effect, we have the canvas and all we are trying to do is fit that canvas into the proper frame.

It is quite evident, of course, that in common law tort the burden of proving him free from contributory negligence is a burden on the plaintiff.

It is equally true that under maritime law the burden of proving contributory negligence is on the defendant. And then you have the comparative negligence rule.

So that we are agreed that the only difference of any significance at all between maritime and common law tort concerns itself with contributory negligence. And I am talking, of course, about the claim by the plaintiff as against Atlantic.

We might as well rush in and dispose of the proposition that with regard to the claim over, under the maritime law, if it is a maritime law, then there is no [378] claim over.

• • • • •

[379] If they find it so, then we propose to charge them with regard to what comparative negligence is, what that means.

And so, in essence, then, with regard to the claim of the plaintiff against Atlantic, the jury will have a guide before it and that guide will read something like this: "Was Atlantic negligent?

"Yes, no.

"Was the plaintiff free from contributory negligence? "Yes, no.

"Considering what you were told with regard to the other side of the coin with respect to contributory negligence, assuming that the burden is on the defendant, Atlantic, to prove contributory negligence, did it sustain such a burden by a preponderance of the credible testimony?

"Yes, no.

"If yes, then to what degree, what percentage of the total fault is attributable to the plaintiff? But put down a percentage.

"Now, ladies and gentlemen, the next point, over and above all that you have disclosed above, what do you, as the fact finders, find with respect to damages? What is the total damage sustained by the plaintiff?"

And then, of course, we propose, with counsel [380] being given additional time, to make motions addressed to the findings of the jury. And if the Court should be convinced that maritime law really is applicable and therefore, the contributory negligence test under maritime law is applicable, we can take the findings of the jury as pronounced by them and do justice in the light of their findings.

Now, with regard to the claimover, we are going forward, as already suggested, with the burden being on Atlantic to show negligence in inspection by Erie and that such negligence was the proximate cause of the injuries sustained, and that that would be so regardless of whether or not they find proximate cause with respect to the claim by the plaintiff against Atlantic.

"What is your answer, jury?

"Yes, no.

"Has that been proven by a preponderance of the credible testimony?"

If the jury says "yes" then "Do you find that Erie should make a contribution to Atlantic?

"Yes, no."

That, in a rough, stumbling fashion, gentlemen, is what I think we have pretty much agreed is the approach. Do you find any fault with the essence of what I have [381] tried to state?

Mr. Altier: None whatsoever by plaintiff.

Mr. Mennis: I think you covered the ground very clearly.

Mr. Roberson: I think that is a good way of proceeding in light of the posture they are taking, in view of the differences that I might have had.

The Court: Fine.

Mr. Altier: I take it we are all in agreement on this procedure and we will then be leaving to your Honor the decision as to which law is applicable to the answer to the jury's question.

The Court: Precisely. We take the fact finders' conclusion of fact and we tailor it to the law, or tailor the law to the facts.

Mr. Altier: And we are all in agreement on that; correct, gentlemen?

Mr. Roberson: Yes.

The Court: You said yes, gentlemen.

* * * * *

CHARGE OF THE COURT

[464] Now, frankly, there's been an issue of law that has come up by reason of the fact that these cars, including the one with which we are concerned, was on a barge in navigable waters. It is an interesting point. We wouldn't have any question if this had happened right a matter of yards on land. It got on the water. Is there another proposition of law involved? We are not completely satisfied from the authorities at this time.

I am explaining to you why we are going to ask you to give us another conclusion of fact with regard to contributory negligence so that when you take your sheet of what you have found to be the facts in this case, we can apply it as a more thorough study of it than the law reveals. And so it will be applicable no matter what the cause of action actually turns out to be when we examine the authorities further.

Do I make myself clear?

[465] Let me show you what that really means. It means that we are going to ask you to determine another proposition of law over and above—proposition of fact, I mean to say, over and above what you would be ordinarily required to do. And I am explaining this to you so that you won't be wondering what is it all about, why is all this. I am making it as clear as time will permit. Under maritime law if this should rove to be a maritime case under the authorities and a further study should reveal that, con-

tributory negligence must be proven by the other side, not by the plaintiff. So we are going to ask you to determine, in addition to what I just told you about with respect to contributory negligence and negligence, whether or not Atlantic Railroad has by a preponderance of the evidence shown that the plaintiff was contributorily negligent. And if you say yes, we want you to tell us by what percentage. In other words, that the railroad, if you should so find, was negligent and 75 per cent, for instance, of the total fault was the railroad and 25 per cent that of the plaintiff. In other words, you list what percentage of fault, of the total fault, the plaintiff contributed to the total fault, and the railroad contributed to the total.

Now, you recognize that is different from the [466] proposition I charged you before where I said the plaintiff must prove negligence, the plaintiff must prove freedom from contributory negligence, and as to that you merely answer yes or no. That is all you do. All we are doing is saying will you go another step further, take the entire record and ask yourselves whether or not, assuming that the burden of proof of contributory negligence is on Atlantic, did Atlantic prove contributory negligence by a preponderance of the credible testimony. And if so, to what extent do you find the plaintiff contributed to the negligence, if any.

• • • • •

[475] So now I come then for the first time to the claim of Atlantic against Erie. Up to now you have been dealing only with the claim of the plaintiff against Atlantic. You know, of course, that you don't get to that claim of [476] Atlantic against Erie unless you find in favor of the plaintiff in connection with the plaintiff's claim against Atlantic. Well, that is obvious. If you so find, then you take into consideration this claim over. Further, if you should find that

Erie Lackawanna was negligent, that fact alone would not entitle plaintiff to any judgment against Atlantic, the only party he has sued.

Now, the fact that I charge you on the law with respect to the claim between Atlantic Coast Line Railroad and Erie Lackawanna must not be taken as an indication of what your verdict should be on the plaintiff's claim against Atlantic Railroad, or on Atlantic Coast Line Railroad's claim against Erie. In giving you the rules of law, I must cover all possibilities.

Atlantic asserts a right to contribution against Erie to the extent of one-half the amount you find in favor of the plaintiff against Atlantic, if you so find.

Atlantic has the burden of proof just as the plaintiff has the burden of proving the claim against Atlantic, Atlantic has the burden of proof, proof by a preponderance of the credible evidence, which I have already repeatedly referred to, on its claim against Erie. The plaintiff has asserted his claim, remember, only against Atlantic. As you know, Atlantic has asserted its claim [477] against Erie.

Now, under law, joint tortfeasors—persons or corporate entities that are jointly responsible for an injury—that is what we are dealing with here. What does that mean? Where two or more parties, while acting independently together contribute to the creation and continuance of a negligent condition, then they are called joint tortfeasors.

Now, the law provides that where an injury is suffered by any person as a result of the negligence of joint tortfeasors and the person suffering an injury recovers a money judgment for such injury against one of the joint tortfeasors, that defendant shall be entitled to recover contribution from the other tortfeasor, the other person who played a part in the production of the negligence. And

thus you must decide whether Erie was also negligent, and is together with Atlantic Coast Line jointly responsible for plaintiff's injuries.

Atlantic's claim then is that if it is held liable to the plaintiff by you, Erie was also negligent and that its negligence was a substantial factor in bringing about the occurrence in which plaintiff was injured.

And as transferee of the car, Erie was under a duty to exercise reasonable care in making an inspection [478] in order to discover defects. And there again you apply the law with regard to what is a reasonable inspection by Erie under all the circumstances that existed at the time.

I remind you that the freight car on which plaintiff was working at the time of his injury had been delivered to Erie Railroad—Erie Lackawanna Railroad on July 27, 1964, and had been in the possession of and had been hauled by that railroad for three days, or until July 30, 1964, the date on which the accident occurred on its car float at Jersey City, New Jersey.

If you find that Erie failed to reasonably inspect that car upon receiving it on July 27th, 1964, and that such failure was a proximate cause of the injury sustained by plaintiff, you shall find in favor of defendant Atlantic Coast Line on its claim over against Erie Lackawanna Railroad Company.

And so the question becomes whether Erie Lackawanna Railroad's acts, as regards its inspection, were negligent and was it performed with reasonable diligence. Was it the kind of inspection and extent of inspection which a reasonable and prudent railroad line would have made? If within the limits of what would constitute a proper routine car inspection, properly conducted at the [479] time and place with which we are concerned and under all the

circumstances then existing either of the defects of the footboard or bracket could not have been discovered, then negligence by Atlantic could not be imputed to Erie despite injuries sustained by the plaintiff, and your verdict must then be in favor of Erie.

[480] If you find that Erie was negligent in that it knew or in the exercise of ordinary care should have known of the existence of either defect, then you must decide whether its negligence was a substantial factor in bringing about plaintiff's injuries.

In this regard the fact that you may find Atlantic Coast Line negligent does not preclude a finding that Erie's negligence played a substantial part in bringing about the plaintiff's injuries.

* * * * *

VERDICT

[505] The Clerk: Members of the jury listen to your verdict as it now stands recorded—

The Court: I think, Mr. Clerk, you better read the entire verdict as it is reflected on Court's Exhibit 1.

The Clerk: Yes, your Honor.

"Question 1. Was the Atlantic Coast Line Railroad negligent?

"Answer: Yes.

"Question 2. If yes, did such negligence contribute in any degree to the plaintiff's injuries?

"Answer: Yes.

"3. Did plaintiff establish that he exercised due care for his own safety?

"Answer: Yes.

"4. If yes on questions No. 1 and No. 2, what is the total amount of plaintiff's damages?

"Answer: $200,000.

"Question 5. If your answer on question No. 3 was no, has defendant established that the plaintiff was contributorily negligent?"

No answer.

"Question 6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad [506] also negligent?

"Yes.

"If so, was such negligence a substantial factor in bringing about plaintiff's injuries?

"Yes."

And so say you all?

The Court: Poll the jury, please.

The Clerk: Members of the jury, you have heard your verdict as it stands recorded.

(The jury was polled and all answered in the affirmative.)

• • • • •

[509] Mr. Roberson: The third-party defendant moves to set aside the verdict and moves for a new trial on the grounds that the verdict was contrary to the law, against the weight of the evidence and that it was excessive.

The third-party defendant also continues its motion which is already on the record with respect to the legal part. And if, as a matter of record, I have to set forth what we have already discussed at length, I will do so at this time.

[510] However, if your Honor thinks that this matter has been covered in our discussions on the record with respect to the legal matter, the claim over juncture, I will not go into it at length except to say also as a matter of law that the third-party plaintiff does not have a claim for contribution against the third-party defendant Erie Lackawanna.

Defendant's Exhibit A

OVERALL VIEW OF CAR ACL 28244

Third-Party Defendant's Affidavit and Notice of Motion to Dismiss Third-Party Complaint, to Set Aside Verdict in Favor of Plaintiff and Against Defendant and for a New Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Lloyd W. Roberson verified April 27, 1970, upon all the pleadings and proceedings had herein, and upon the annexed Memorandum of Law dated April 27, 1970, an application will be made by the undersigned to Honorable Irving Ben Cooper, United States District Judge, at Room 1106 or such other place as he may designate, on May 12, 1970 at 10:00 o'clock in the forenoon thereof, or such other date and time as the court may designate, for an order:

(1) granting permission to all parties to amend their pre-trial memorandums, the pre-trial order and the respective pleadings so as to indicate the maritime jurisdiction over the respective claims;

(2) dismissing the third party complaint as a matter of law on the grounds that (a) the contribution is not allowed under maritime law in cases such as this, and (b) even if New Jersey Law were applied, there would be no contribution where the incident falls within the Longshoremen's and Harbor Workers' Compensation Act.

(3) setting aside the verdict in favor of plaintiff against defendant on the grounds that (a) there was insufficient basis to form a conclusion as to the duration of the weld or bracket fracture, there was insufficient basis to find any casual connection between any break in the handbreak step and plaintiff's incident, and that it was otherwise contrary to law;

(4) setting aside the verdict in favor of plaintiff on the grounds that it was against the weight of evidence;

(5) setting aside the verdict in favor of the plaintiff against defendant on the grounds that such verdict is excessive;

(6) granting a new trial in the alternative;

(7) granting judgment in favor of the third party defendant on the third party claim on the grounds that the preponderance of the evidence shows that if third party plaintiff were negligent it was the primary party causing negligence to the degree it would have been found liable in indemnity to the third party defendant.

Dated: New York, New York
April 27, 1970

Yours, etc.,

LLOYD W. ROBERSON
Attorney for Third Party Defendant
Erie Lackawanna Railway Company
140 Cedar Street
New York, New York 10006
BArclay 7-2500

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I, LLOYD W. ROBERSON, being duly sworn, depose as follows:

I am the attorney for the third party defendant Erie Lackawanna Railway Company.

At the conclusion of the trial of the within action before Honorable Irving Ben Cooper, it was requested that motions be submitted on written papers. This affidavit, the notice of motion, and the memorandum dated April 27, 1970, are submitted for the courts consideration.

There has been no prejudice to plaintiff in the discovery of the application of the maritime law. There is no prejudice to defendant whose attorneys still do not want to recognize its application. Despite the large research facilities of defendant's counsel, no memorandum or even oral citation has been furnished to refute third party defendant's position.

It is respectfully submitted that the third party defendant's application be granted.

LLOYD W. ROBERSON

[Jurat omitted in printing.]

Final Judgment of the District Court in Favor of Plaintiff and Against Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

The above entitled action having been tried before Judge Irving Ben Cooper and a jury on April 13, 14, 15 and 16, 1970; and the jury having answered the following stated interrogatories in the following manner:

1. Was the Atlantic Coast Line Railroad negilgent?

A. Yes.

2. If yes, did such negligence contribute in any degree to the plaintiff's injuries?

A. Yes.

3. Did plaintiff establish that he exercised due care for his own safety?

A. Yes.

4. If yes on questions #1 and #2 what is the total amount of plaintiff's damages?

A. $200,000.00.

5. If your answer on question #3 was no, has defendant established that the plaintiff was contributorily negligent?

6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent?

A. Yes.

If so, was such negligence a substantial factor in bringing about plaintiff's injuries?

A. Yes.

and having returned a verdict in favor of Theodore Benazet in the sum of $200,000.00, against defendant Atlantic Coast Line Railroad Company, and it further appearing that Rule 54b of the Federal Rules of Civil Procedure is applicable in that plaintiff is in monetary need of his money judgment and there is no just reason why judgment ought not be entered for plaintiff even though judgment as between defendant and third party defendant is not entered simultaneously herewith, and there being no prejudice to the defendant or third party defendant by the entry of judgment herein.

It is, on this 30th day of April, 1970,

ORDERED, that judgment in the sum of $200,000.00 be entered in favor of Theodore Benazet, plaintiff, and against Atlantic Coast Line Railroad Company, defendant, with costs.

IRVING BEN COOPER
Irving Ben Cooper
Judge, U. S. D. C.

Judgment entered: 4/30/70

JOHN LIVINGSTON
Clerk

Defendant and Third-Party Plaintiff's Affidavit and Notice of Motion for an Order Setting Aside Verdict of the Jury Against Defendant Atlantic and for a New Trial Dated May 8, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of James J. Mennis, sworn to the 8th day of May, 1970, and upon all the pleadings and proceedings had herein and upon annexed memorandum of law dated May 8, 1970, the undersigned will move this court at a trial term thereof to be held at Room 1505 of the United States Court House, Foley Square, in the Borough of Manhattan, City and State of New York before Honorable Irving Ben Cooper, United States District Judge on the 21st day of May, 1970 at 10:00 in the forenoon of that day, or at such other date and time as the court may designate, for an order setting aside the verdict of the jury against defendant Atlantic Coast Line Railroad Company returned herein on April 16, 1970 and the judgment entered thereon April 30, 1970 and to grant a new trial on the following grounds:

1. The verdict as to said defendant was contrary to law.

2. The verdict as to said defendant is against the weight of the evidence.

3. The evidence in this case is totally insufficient to show liability on the part of defendant.

4. The verdict of the jury is excessive and appears to have been motivated by an excess of sympathy for plaintiff.

This motion is based upon the record and proceedings in this action.

Dated: New York, New York
May 8, 1970

Yours, etc.,

CARTER, LEDYARD & MILBURN

By JAMES J. MENNIS
Attorneys for Atlantic Coast Line Railroad Company,
Defendant and Third-Party Plaintiff
Office and P. O. Address
2 Wall Street
New York, New York 10005

[To all attorneys of record.]

Affidavit of James J. Mennis Annexed

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JAMES J. MENNIS, being duly sworn deposes and says:

I am an attorney associated with the firm of Carter, Ledyard & Milburn, attorneys for Atlantic Coast Line Railroad Company, defendant and third-party plaintiff, and am familiar with all proceedings had herein and make this affidavit in support of defendant's motion for an order setting aside the verdict of the jury herein against it and to grant a new trial on the several grounds set forth in the Notice of Motion.

This judgment was entered on April 30, 1970 on the basis that Rule 54b of the Federal Rules of Civil Procedure is applicable.

It is undisputed that car ACL 28244 was out of the possession of defendant from June 4, 1964 to September 16, 1964 (see list annexed to Answer of Defendant to Interrogatory 1 dated May 31, 1966).

It is also undisputed that this car was delivered by defendant to Georgia Railroad on June 3, 1964 and was in turn delivered to seven different railroads before it was delivered to Erie Lackawana Railroad Company on July 27, 1964. Admittedly, it was either not inspected by Erie Lackawanna on that date nor at any time before the accident happened on July 30, 1964.

The written interrogatories involving Erie Lackawanna Railroad submitted to the jury was answered as follows:

• • • • •

"6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent?

Yes No

If so, was such negligence a substantial factor in bringing about plaintiff's injuries?

Yes No"

From the foregoing it is apparent the jury found that Erie Lackawanna was also negligent and that such negligence was a factor in bringing about plaintiff's injuries.

Defendant's Exhibit M in evidence, shows the last inspection of Atlantic Coast Line Railroad Company of this car while in train 294 after its arrival at Augusta, Georgia on June 3, 1964, showed arrival of train 350 at 5:08 A.M. at which time inspection commenced and was completed at 6:05 A.M. prior to being delivered to Georgia Railroad on June 4, 1964.

A detailed search of its records by defendant could not uncover any record of the brackets on car ACL 28244 having at any time been welded by it. Neither did it have any record from any other carrier in possession of this car at any time having done a welding job on these brackets. The witness Riedinger who did see the weld described it as being a "butcher job". The witness Faller (plaintiff's expert) when questioned about the appearance of the weld, testified if the weld was as bad as described, it would be

unlikely that whoever did the job would make a report of it to the owning line.

The plaintiff as a result of the injuries sustained by him was unable to work for a period of approximately one year after the accident on July 30, 1964. Since returning to work the latter part of July 1965, he has worked continuously as a brakeman for Erie Lackawanna. His testimony indicated he has not lost more than two weeks a year. Third-Party Defendant's Exhibit "A" indicates plaintiff's yearly earnings have increased from $6,000 per year to approximately $9,000. Counsel for Erie Lackawanna has figured his lost earnings to date to be $7,500. His future loss, based on his past earnings at approximately $10,000 or a total undiscounted figure of $17,500.

In this connection it should be noted that when the plaintiff in 1966 instituted suit the ad damnum clause of the complaint was $135,000. No application to increase the amount sued for to $285,000 was made until after counsel had summed up and shortly before the case was given to the jury. The plaintiff is presently employed, has seniority on his job and in all probability will continue to work for a number of years. Under the circumstances the award of the jury was excessive and on this ground alone the verdict should be set aside and a new trial granted.

Both in its third-party summons and complaint served on January 16, 1969 and its amended answer to plaintiff's complaint dated June 20, 1969 Atlantic Coast Line Railroad Company as defendant and third-party plaintiff demanded judgment that the complaint be dismissed as to it, or, in the alternative

"that defendant and third-party plaintiff Atlantic Coast Line Railroad Company demands judgment against

third-party defendant Erie Lackawanna Railroad Company [*for all sums that may be adjudged against the defendant Atlantic Coast Line Railroad Company*] or, that said defendant and third-party plaintiff be entitled to judgment against third-party defendant for contribution as a joint tort-feasor for any sum that may be adjudged against defendant Atlantic Coast Line Railroad Company in favor of plaintiff Theodore Benazet." (Emphasis added).

Deponent at the conference in the robing room recalls the court making a reference that it did not think indemnity could be sustained. However, the only comment deponent recalls making in response to the court's reference to indemnity, was that defendant Atlantic Coast Line Railroad Company was relying principally on its right to contribution. Deponent has no recollection of withdrawing defendant Atlantic Coast Line Railroad Company's right of indemnity as indicated in page 1 of "Statement of counsel for third-party defendant Erie Lackawanna that

"before submission of the case to the jury the indemnity claim was withdrawn."

Deponent does not contest the issue of the application of Maritime Law in this case.

It is respectfully submitted that the judgment entered herein against defendant Atlantic Coast Line Railroad Company on April 30, 1970 be set aside and a new trial granted.

(Sworn to by James J. Mennis on May 8, 1970).

Affidavit of Lloyd W. Roberson in Opposition to Motion Dated May 8, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I, Lloyd W. Roberson, being duly sworn, depose as follows:

1. I am the attorney for the third party defendant, and the attorney who tried the within action on behalf of the third party defendant.

2. This affidavit is submitted in opposition to the notice of motion, dated May 8, 1970 and served on May 11, 1970, at 5:07 P. M.

3. This affidavit is primarily to keep the records straight as to certain points contained in the affidavit of James J. Mennis submitted in support of said motion.

4. Mr. Mennis states that "Admittedly, it was either not inspected by Erie Lackawanna on that date nor at any time before the accident happened on July 30, 1964." Erie Lackawanna did not admit to making no inspection of the car in question. Erie Lackawanna does admit that there

is no record of any inspection procedure of climbing the ladder to closely observe the handbrake of the car in question.

5. Mr. Mennis deposes that he has no recollection of withdrawing the claim for indemnity.

6. As the court will recall, at a time when all counsel were in the robing room with the presiding judge, presiding Judge Irving Ben Cooper indicated to the attorney for the plaintiff that the attorney for the plaintiff would probably want to amend his pleadings to conform to the proof. Honorable Irving Ben Cooper also asked Mr. Mennis, counsel for the defendant and third party plaintiff, whether he was continuing his indemnity claim. Mr. Mennis stated that he was withdrawing the claim based on indemnity.

7. The effect of such announcement was to set the pattern as to the areas in which the jurors would be asked specific questions or give responses to specific interrogatories.

8. After the statement of withdrawal by Mr. Mennis, there was no further consideration given to charging the jury relative to the same or proposing any specific interrogatories concerning such indemnity.

9. Assuming for the sake of argument, this court was faced with a situation where either indemnity or contribution might possibly lie, the quantum of proof and the nature of proof would differ.

10. Furthermore, such withdrawal had a bearing on the approach that I took with the jury. A party in the posi-

tion of the defendant is much less likely to obtain an affirmative finding of negligence on the part of the third party defendant where the jurors feel that an indemnity may be the remedy. The defendant and third party plaintiff is having its cake and eating it too if it were allowed to reassert the indemnity claim in the present posture of the action.

11. Inasmuch as it has become necessary to make this affidavit, I also refer to a statement made by J. J. Mennis in his affidavit of April 24, 1970. Mr. Mennis indicates that the memo of law came to his attention in the late afternoon of Wednesday, April 15, 1970. In point of time, Mr. Mennis was advised of the memo about five minutes after he commenced interviewing Dr. Balensweig, while the court was in recess. Mr. Mennis was told by me that he look at the memo as soon as possible, if not then, because he might want to have his office check on some of the points contained in the memorandum.

LLOYD W. ROBERSON

[Jurat omitted in printing.]

Notice of Appeal of Defendant and Third-Party Plaintiff Dated June 1, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

Notice is hereby given that Atlantic Coast Line Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in this action in favor of plaintiff and against defendant, Atlantic Coast Line Railroad Company, on the 30th day of April, 1970.

Dated: June 1, 1970

CARTER, LEDYARD & MILBURN

By /s/ DEVEREUX MILBURN
A Member of the Firm
Attorneys for Atlantic Coast Line Railroad Company, Defendant and Third-Party Plaintiff
Office and P. O. Address
2 Wall Street
New York, New York 10005

[To all attorneys of record.]

Opinion With Judgment on Third-Party Claim Inscribed Thereon

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1404

THEODORE BENAZET,

Plaintiff,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff,

against

ERIE LACKAWANNA RAILROAD COMPANY,

Third Party Defendant.

Judgment entered thereon 7/17/70 /s/ JOHN LIVINGSTON *Clerk*

(Appearances: Omitted in printing)

IRVING BEN COOPER, *D.J.*:

Plaintiff Benazet brought suit against defendant Atlantic Coast Line Railroad Company (Atlantic) for damages suffered as a result of his fall from a railroad boxcar owned by Atlantic claiming Atlantic negligently released the car into commerce in a defective condition and failed to inspect, repair and warn of the defective condition. This action was removed to this Court from the Supreme Court, New York County, by Atlantic, federal jurisdiction resting

upon diversity of citizenship. Thereafter, Atlantic impleaded plaintiff's employer Erie Lackawanna Railroad Company (Erie) asserting that Erie was in possession of the car at the time of the accident and was negligent in failing to properly inspect the car so as to discover any defective condition and, thus, liable either in contribution or indemnity for either one-half or the full amount, respectively, of any judgment plaintiff might recover against Atlantic.

Following a four day trial, the jury on April 16, 1970 returned a verdict in favor of plaintiff in the amount of $200,000. Judgment was entered as to the main claim on April 30, 1970 pursuant to Rule 54(b), F.R.Civ.P.

We are here faced with certain legal contentions the resolution of which will determine the third party action. In connection with these questions of law including jurisdiction, motions have been filed by all parties herein to amend the pleadings to conform with the proof. Finally, both defendant and third party defendant have moved on several grounds for an order setting aside the verdict or in the alternative granting a new trial.

* * * * *

On July 30, 1964 Benazet was injured when, in the course of his duties as a brakeman employed by Erie, he attempted to tighten a handbrake on a railroad boxcar owned by Atlantic. Plaintiff claimed, and the jury evidently so found, that the accident and consequent injuries occurred generally as follows: as he was applying the handbrake a rotted foot board gave way under his foot causing his weight to go upon the handbrake assembly which in turn broke away from the car as a result of the defective condition of the brackets affixing the handbrake assembly to the freight car resulting in plaintiff's fall. Proof at trial which the jury was entitled to credit, established that the brackets

were defective in that they had fissures over an inch long, a condition requiring years to develop. Some time prior to the accident an attempt had been made to repair the breaks in each bracket by spot welding, a highly improper procedure at best and performed so poorly herein that one witness described it as a "butcher job."

This car owned by Atlantic left its possession on June 4, 1964, less than two months prior to the accident. Between that date and July 27, 1964 when it was delivered to Erie, it is acknowledged that it had been in the possession of and operated over approximately seven different railroads in different parts of the country. Erie had this car in its possession for three days prior to July 30, 1964, the date of plaintiff's injury. Nevertheless, based on the testimony with respect to the age of the defects, we believe there was adequate evidence to support the jury's requisite finding on the element of proximate causation that Atlantic was either the cause or knew or should have known of the existence of the defects in the brackets of the car it placed in commerce and that there was no superceding cause of the accident.

At the time of the accident the boxcar from which plaintiff fell was on a carfloat owned by Erie. The carfloat was a barge (having no motor power) with tracks to accommodate railroad cars. This carfloat was moored on the Hudson River near the New Jersey shore next to an Erie float bridge—a floating pier used for the loading or unloading of carfloats. The carfloat was fully loaded and ready for its scheduled towing across New York Harbor to connect with the Long Island Railroad. At the time of his fall to the dock of the carfloat, plaintiff was tightening the handbrake involved here in order to make the last boxcar more secure for that voyage.

Excessiveness of the Verdict; Other Post Trial Motions

At the outset we dispose of defendant's and third party defendant's various motions to set aside the verdict and grant a new trial, which we denied after the jury's verdict but with leave to renew in writing.

As to the motions addressed to the claimed excessiveness of the jury's verdict: we can well understand how the jury came to regard plaintiff's testimony as forthright, clean and without exaggeration. That portion of the entire trial record which concerns itself with the pain and suffering endured, and clearly to be anticipated, demonstrates experiences of deap-seated unremitting and excruciating pain, both physical and mental, over an extensive period of time.

Wages lost before trial, loss of future wages and increments thereon (the reasonable expectancy of working years was 22 as agreed upon), the medical expense actually incurred and reasonably to be anticipated, were closely calculated and met with no disturbing opposition. See *Grunenthal* v. *Long Island R. Co.*, 393 U.S. 156 (1968).

We were very strict in holding the jury to these items of damage only which the law countenances: [From the trial judge's draft of the charge to the jury (court reporter's minutes not presently available).]

> "Now, what I have been laying down to you as to the law of damages is the law's formula for the assessment of damages. You have no power to alter that formula. Yes, you have the power under the law to determine the proper amount, if you should so find, of each item of damage, but you do not have the legal power to substitute another formula for the

only one that the law recognizes. On all the items of damage you are to be guided by your common sense. As with everything else in this case, you are to be guided by what life has taught you, the experiences you have had, and such an award as you make must bear a reasonable relationship to the nature and extent of the injuries which you find, and all these items of damage then are to be totaled up into one lump sum."

With regard to the remaining motions: as indicated by our factual recital above, there was sufficient credible evidence of record to show liability on the part of defendant; the verdict was neither contrary to law; nor against the weight of the evidence.

Maritime Jurisdiction

After two days of trial and on the eve of the Court's charge to the jury, Erie served and filed a memorandum of law contending for the first time that it had only then come to realize (and its hasty research confirm) that this case was properly one of maritime jurisdiction. Prior thereto, and in accordance with the pleadings, all parties proceeded under the assumption that New Jersey law governed both the main action and the claim over, as the requests to charge submitted by all parties at that time reflect.

Having insufficient time to resolve the difficult question of which law properly governed, we resolved, with the advance approval of all parties, to frame our charge and propound special interrogatories to the jury so as to prevent, hopefully, any possible need for a retrial regardless of the law eventually found applicable to the precise factual

area defined herein. In substance, the jury specifically found Atlantic negligent and such negligence a proximate cause of plaintiff's injuries; plaintiff was not contributorily negligent; damages of $200,000; Erie also negligent and such negligence likewise a proximate cause of plaintiff's injuries.[1]

The jury's finding that plaintiff was not contributorily negligent, amply supported by the trial record, removed any problem as to whether any such negligence would be a complete bar or whether, instead, comparative negligence under maritime law was applicable. The remaining question is whether, despite the jury's finding of negligence by Erie as well as Atlantic, Erie is nevertheless entitled to dismissal of the third party action because: (1) either maritime law governs and contribution is not permitted in a non-collision suit such as this, or, (2) regardless of whether maritime law governs, under the New Jersey Joint Tortfeasors Contribution Act, 2A N.J.S.A. Chap. 53A, contribution is not available from an employer such as Erie against

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[1] The interrogatories propounded and the jury's responses in full are as follows:

1. Was the Atlantic Coast Line Railroad negligent? A. Yes.
2. If yes, did such negligence contribute in any degree to the plaintiff's injuries? A. Yes.
3. Did plaintiff establish that he exercised due care for his own safety? A. Yes.
4. If yes on questions #1 and #2 what is the total amount of plaintiff's damages? A. $200,000.
5. If your answer on question #3 was no, has defendant established that the plaintiff was contributorily negligent? If yes, what percent? [not answered].
6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent? A. Yes.
7. If so, was such negligence a substantial factor in bringing about plaintiff's injuries? A. Yes.

whom plaintiff's exclusive remedy is a compensation act, in this case the Longshoremen's and Harbor Workers' Act.[2]

There is undisputed diversity of citizenship jurisdiction over this action. Jurisdiction under 28 U.S.C. § 1332 being present, we believe it unnecessary, even with mari-

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[2] Atlantic informed the Court and Erie during the course of trial that it withdrew its cause of action for indemnity. Accordingly, the Court charged the jury only on Atlantic's third party claim for contribution and the interrogatories submitted to the jury did not inquire into the question of active-passive or primary-secondary negligence as between Atlantic and Erie. No objection was taken by Atlantic to either the Court's charge on the claim over or to the interrogatories propounded.

This withdrawal was so understood by Lloyd W. Roberson, Esq., counsel for Erie who stated on the first page of a memorandum dated April 27, 1970 in support of his motions to dismiss, set aside the verdict and for a new trial: "Before submission of the case to the jury the indemnity claim was withdrawn."

Nevertheless, James J. Mennis, Esq., counsel for Atlantic, stated for the first time in the course of an affidavit (pages 4-5 thereof) dated May 8, 1970 in support of various post-trial motions to set aside the verdict and judgment thereon and grant a new trial:

> "However, the only comment deponent recalls making in response to the court's reference to indemnity, was that defendant Atlantic Coast Line Railroad Company was relying principally on its right to contribution. Deponent has no recollection of withdrawing defendant Atlantic Coast Line Railroad Company's right of indemnity. . . ."

In response Mr. Roberson avers:

> "6. As the court will recall, at a time when all counsel were in the robing room with the presiding judge, presiding Judge Irving Ben Cooper indicated to the attorney for the plaintiff that the attorney for the plaintiff would probably want to amend his pleadings to conform to the proof. Honorable Irving Ben Cooper also asked Mr. Mennis, counsel for the defendant and third party plaintiff, whether he was continuing his indemnity claim. Mr. Mennis, stated he was withdrawing the claim based on indemnity.
>
> 7. The effect of such announcement was to set the pattern as to the areas in which jurors would be asked specific questions or give responses to specific interrogatories.
>
> 8. After the statement of withdrawal by Mr. Mennis, there was no further consideration given to charging the jury rela-

time law governing, that the parties amend their pleadings to assert the possible additional jurisdictional basis in ad-

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tive to the same or proposing any specific interrogatories concerning such indemnity.

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10. Furthermore, such withdrawal had a bearing on the approach that I took with the jury. A party in the position of the defendant is much less likely to obtain an affirmative finding of negligence on the part of the third party defendant where the jurors feel that an indemnity may be the remedy. The defendant and third party plaintiff is having its cake and eating it too if it were allowed to re-assert the indemnity claim in the present posture of the action." Affidavit of Lloyd W. Roberson, Esq., May 12, 1970.

Let's look at the record:

"The Court: Now Mr. Mennis—on the record—we did so much, I think we accomplished a lot off the record during the course of trial, but we can place on the record what we have agreed to.

Let the record show that you agreed to withdraw against Erie your claim for indemnity and to rely only on the claim of contribution.

Mr. Mennis: Yes, that's correct."

Minutes of Benazet v. Atlantic Coast Line v. Erie, April 16, 1970 (not transcribed as of the date of this opinion).

We need not rest solely upon this unequivocal withdrawal, however, for, in any event, the nature of the claims of negligence asserted against Atlantic by plaintiff and, in turn, against Erie by Atlantic, combined with the evidence developed at trial and the jury's finding that both were negligent appears to preclude the possibility of indemnity being successfully maintained. Atlantic's negligence was not "passive" or "secondary" and Erie's negligence "sole," "active" or "primary." See generally Gilmore & Black, The Law of Admiralty at 367-74 (1957). We believe the active-passive standard would be controlling on a claim of indemnity in this situation where the employer third party defendant has no contractual relationship with the defendant and third party plaintiff and where the defendant third party plaintiff cannot be held liable without fault. Compare *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 132-33 (1956). There is no warranty running from Erie to Atlantic which might justify finding a contractual basis for indemnity. Compare *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 320-21 (1964).

miralty, 28 U.S.C. § 1333.[3] Accordingly, the motions to amend are denied.

Plaintiff's fall from the boxcar occurred on board a car-float, a vessel then moored to a floating pier in navigable waters, loaded and scheduled to be towed across New York Harbor. While the question is not wholly free from doubt, we conclude that federal maritime law is the substantive law governing this case, both as to the prime suit and the claim over. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953); *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1958). See also, *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 338-40 (1953) (a strikingly similar fact situation in which the Supreme Court held O'Rourke could not maintain an FELA action against his employer, his exclusive remedy held to be the Harbor Workers' Act); *Nogueira* v. *N.Y., N.H. & H. R. Co.*, 281 U.S. 128, 134 (1930). Indeed, both Atlantic and Erie appear to so concede. See Memorandum of Law of Defendant and Third Party Plaintiff, May 11, 1970, p. 1; Memorandum of Law of Third Party Defendant, April 27, 1970.

Contribution

Having found maritime law controlling, we are faced with the perplexing and often not wholly consistent body of law which frequents this area and from which we must

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[3] Where the suit is, as here, *in personam*, it may be brought in federal court under the head of diversity of citizenship jurisdiction on the law side of the court (entitling one to a jury trial) on the basis that "Congress since 1789, in giving Federal District Courts original jurisdiction of civil cases in admiralty, has saved 'to suitors in all cases all other remedies to which they are otherwise entitled.'" *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines Ltd.*, 369 U.S. 355, 359-60 (1962).

obtain our guidance as to whether contribution is available. The leading case is *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) in which the Supreme Court was faced with a conflict among the Circuits as to the existence and extent of contribution in non-collision maritime torts. A ship owner, sued for negligence and unseaworthiness by an injured employee of a shoreside contractor engaged by the ship owner to make repairs on a ship moored in navigable waters, impleaded the contractor seeking contribution on the ground the contractor's negligence had contributed to the injuries.

It was the conclusion of the Supreme Court that:

> "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. . . . Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.
>
> In view of the foregoing, and because Congress while acting in the field has stopped short of approv-

ing the rule of contribution here urged, we think it inappropriate for us to do so." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. at 285-87.

This decision still stands and Congress has not acted to extend the law of contribution to non-collision matters. There has, however, been considerable erosion of the effect of *Halcyon*. Thus, in subsequent decisions the Supreme Court held contractually-based indemnity actions were maintainable although actions for contribution between joint tortfeasors were not. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). See also, Gilmore & Black, The Law of Admiralty at 367-74 (1957).

Conceding that maritime law is applicable and that *Halcyon*, while often circumvented has not been overruled, Atlantic argues that there is a void in federal maritime law on the subject of contribution in non-collision cases and that, under settled principles, state law—here, the New Jersey Joint Tortfeasors Contribution Act—may be applied to fill that void as a supplement to the general maritime law. In the absence of a federal provision or common law right of action state wrongful death statutes have been invoked to recover for a maritime death. See *The M/V "Tungus"* v. *Skovgaard*, 358 U.S. 588 (1958); *Hess* v. *United States*, 361 U.S. 314 (1960). There, too, Congress had enacted statutes providing for wrongful death actions in a limited number of situations, but had "stopped short" of providing full coverage. However, this possible analogy to *Halcyon* and the Supreme Court decision to not extend the maritime rule of contribution was not developed by the Supreme Court in its decisions incorporating state wrongful death statutes into maritime law.

In *Frueh* v. *Kupper* v. *Frueh*, 54 N.J. Super. 296, 148 A.2d 743 (1959) the New Jersey Superior Court reasoned:

> "The question of applicability of a state joint tortfeasors act was not discussed in the Halcyon case. The accident here occurred in waters within the geographical boundaries of New Jersey. The language of the Joint Tortfeasors Act has sufficient scope to include a maritime cause of action which arises in New Jersey. This act is broadly construed." 148 A.2d at 749.

The question is a close one. We believe, however, that the wrongful death cases are properly distinguishable and that *Halcyon* is determinative of the case at bar. The Supreme Court in *The Tungus* before adopting the state right of action for wrongful death reiterated "the established principle of maritime law that in the absence of a statute there is no action for wrongful death." 358 U.S. at 590. Thus, in adopting state wrongful death statutes, the Court never held that it had the power to create such an action at common law, but would refuse to do so because it was not convinced of its value and believed Congress by its selective action had expressed a contrary intent.

In contrast, in considering its power to fashion an extension of the existing maritime rule of contribution, the Supreme Court in *Halcyon* stated "we would feel free to do so here if wholly convinced that it would best serve the ends of justice." 342 U.S. at 285. Thus, as we see it, the *Halcyon* ruling that "[i]n view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so," cannot be seen as

merely leaving a void in federal maritime law respecting contribution which a court is free to fill by the adoption of a state contribution statute. We believe the Supreme Court has stated that with much Congressional legislation already in existence in this area, the decision whether to extend a right of contribution here and, if so, in what manner, must be left to Congress in order to accommodate the "many groups of persons with varying interests . . . vitally concerned with the proper functioning and administration of these Acts as an integrated whole."[4] 342 U.S. at 286.

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[4] Even if the New Jersey Joint Tortfeasors Contribution Act were adopted, the result would be far from clear. The Joint Tortfeasors Act is inapplicable to a third party suit against the employer of the injured plaintiff, at least where workmen's compensation exists and is the employee's exclusive remedy against his employer. See *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A. 2d 752 (App. Div. 1954). The Supreme Court in adopting state wrongful death statutes holds that the right must be enforced as an integrated whole, with whatever conditions and limitations the creating state has attached. See *The m/v Tungus* v. *Skovgaard*, 358 U.S. at 591-94.

Here, the third party suit is against plaintiff's employer. While state workman's compensation is inapplicable, plaintiff is covered by the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. In the virtually identical fact setting of *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1952) the Supreme Court held that railroad employee's remedy was under the Harbor Workers' Act exclusively, and not under the F.E.L.A.

Since *O'Rourke*, however, longshoremen, covered by the Harbor Workers' Act, have been permitted to sue their own employer, where that employer is also the shipowner, for unseaworthiness, despite the provision of the Harbor Workers' Act that the liability of an employer under the Act "shall be exclusive and in place of all other liability." See *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967). Although plaintiff Benazet is not a longshoreman, the Supreme Court's reliance in *Jackson* on its expansive grant of the benefits of the seaworthiness doctrine to a wide range of maritime employees combined with its announced desire to avoid "a harsh and incongruous result" leads us to conclude that this plaintiff

CONCLUSION

Accordingly, we hold that the third party claim for contribution must be dismissed as a matter of law.

SO ORDERED:

New York, N. Y.
July 2, 1970

United States District Judge

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would probably be entitled to maintain a suit based on unseaworthiness of the carfloat owned by his employer Erie.

If we are correct, then the Harbor Workers' Act would not be plaintiff's exclusive remedy and the New Jersey Joint Tortfeasors Law might in this context permit an action for contribution against Erie. If so, then two questions would still remain: (1) is unseaworthiness necessarily present here in light of the factual setting of a defective boxcar on board Erie's carfloat and the jury's finding that Erie was negligent? (2) If yes, might Erie nonetheless be entitled to indemnity from Atlantic for any liability to plaintiff on the ground Atlantic was primarily responsible and, if so, would this not preclude joint contribution?

We find it unnecessary to travel this tortuous path to a possible conclusion for the reason already set forth—we believe *Halcyon* determinative of the question here presented.

Amended Notice of Appeal Dated July 2, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

Notice is hereby given that Atlantic Coast Line Railroad Company, Defendant and Third-Party Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action in favor of Erie Lackawanna Railroad Company, Third-Party Defendant, and against Atlantic Coast Line Railroad Company, Defendant and Third-Party Plaintiff, on the 2nd day of July, 1970 dismissing its Third-Party Complaint, and the Judgment entered thereon July 17, 1970.

Dated: July 20, 1970

CARTER, LEDYARD & MILBURN

By HOMER R. COOLIDGE

Attorneys for Atlantic Coast Line Railroad Company, Defendant and Third-Party Defendant

[To all attorneys of record.]

Opinion of the Court of Appeals and Judgment Thereon

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 474-475—September Term, 1970.

(Argued March 16, 1971 Decided April 23, 1971.)

Docket Nos. 35278, 35279

THEODORE BENAZET,

Plaintiff-Appellee,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY,

Third-Party Defendant-Appellee.

Before:

SMITH and MOORE, *Circuit Judges,*
and TIMBERS,* *District Judge.*

* Chief Judge, United States Court for the District of Connecticut, sitting by designation.

Appeal from $200,000 judgment entered upon jury verdict after trial in United States District Court for Southern District of New York, Irving Ben Cooper, *District Judge,* and from order dismissing third party complaint. 315 F. Supp. 357 (S.D.N.Y. 1970). Affirmed.

JOSEPH P. ALTIER, New York, N. Y. (Bromsen & Gammerman, on the brief), *for plaintiff-appellee.*

DEVEREUX MILBURN, New York, N. Y. (Carter, Ledyard & Milburn, Frank G. Kurka, James J. Mennis and Jerome L. Getz, on the brief), *for Atlantic Coast Line Railroad Company, defendant and third party plaintiff-appellant.*

LLOYD W. ROBERSON, New York, N. Y., *for Erie Lackawanna Railroad Company, third party defendant-appellee.*

TIMBERS, *District Judge:*

Appellant Atlantic Coast Line Railroad Company (Atlantic) appeals from a $200,000 judgment entered against it after a four day jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, *District Judge,* and from an order entered by Judge Cooper after trial dismissing Atlantic's third party complaint against the Erie Lackawanna Railroad Company (Erie). 315 F. Supp. 357 (S.D.N.Y. 1970).

The accident occurred July 30, 1964. Plaintiff was employed as a yard brakeman by Erie. He sustained injuries

while working on a box car owned by Atlantic. The box car was being moved from the shore near Jersey City, New Jersey, over a float bridge and on to a carfloat which is a barge with railroad tracks to accommodate railroad cars. The carfloat was owned by Erie. It was moored on the Hudson River which is part of the navigable waters of New York Harbor just off the Jersey shore. Plaintiff fell from the box car to the deck of the carfloat. His fall was caused by a defective handbrake on the box car which he was attempting to tighten while standing on a footboard which had rotted and decayed. When the footboard and handbrake assembly gave way, plaintiff was catapulted to the deck of the carfloat. No issue is raised on this appeal with respect to the defective conditions of the box car owned by Atlantic being the proximate cause of plaintiff's injuries.

Atlantic's essential claims on appeal are (1) that the case was erroneously submitted to the jury on the issue of contributory negligence; (2) that Atlantic's asserted right of contribution between joint tort feasors in a non-collision case was erroneously rejected in the dismissal of its third party complaint against Erie; and (3) that the trial judge erroneously refused to set aside the verdict as excessive. Finding no error, we affirm.

I.

We need not tarry long over Atlantic's claim that the case was erroneously submitted to the jury on the issue of contributory negligence. In the first place, in response to a written interrogatory submitted with the approval of all counsel, including Atlantic's, the jury expressly found that plaintiff was not contributorily negligent; and our independent examination satisfies us that this finding is adequately supported by the record. Furthermore, Atlantic's counsel not only did not object to the manner in which the

judge submitted the issue of contributory negligence to the jury, but he participated in the formulation of the charge as given on this issue.

What happened was somewhat unusual. At the conclusion of the third day of the trial of an action that had been pending for four years, counsel for Erie submitted a memorandum of law indicating for the first time that general maritime law governed rather than the common law as all counsel and the judge had supposed up to that point. Confronted with this development at the close of the evidence and on the eve of summations and charge, Judge Cooper resorted to what strikes us as a sensible, practical method of resolving the dilemma: he invited all counsel to confer with him and to participate in the formulation of the charge and written interrogatories to be submitted to the jury, especially on the issue of contributory negligence. They did. There emerged a charge, agreed to by all counsel, under which the jury was instructed with respect to the applicable rule of contributory negligence under common law (complete bar to recovery) and under general maritime law (comparative negligence). The charge was accompanied by seven written interrogatories, also agreed to by all counsel, in response to which the jury was instructed to decide (No. 3) whether plaintiff had established "that he exercised due care for his own safety" (which the jury answered in the affirmative), or (No. 5), in the event its answer were in the negative to No. 3, whether defendant had established "that plaintiff was contributorily negligent" and, if so, "what per cent" (which the jury did not answer, having answered No. 3 in the affirmative).[1]

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[1] The seven written interrogatories, together with the jury's responses, are set forth in full in the District Court's opinion. 315 F. Supp. 357, 360 n. 1.

We have no doubt that the trial judge, if given more time to determine whether the common law or general maritime law governed, would have preferred to have submitted the issue of contributory negligence to the jury differently. We are satisfied, however, under the circumstances that essential justice was done. And certainly Atlantic is foreclosed from claiming error with respect to a charge in which it acquiesced and to which it interposed no objection until after the return of a substantial verdict against it.

II.

Atlantic's third party claim against Erie was based alternatively on indemnity or contribution between joint tort feasors. At trial, in response to the judge's inquiry before charging the jury, Atlantic's counsel withdrew its indemnity claim. Such withdrawal was confirmed by Atlantic's counsel at the time of oral argument before us.

Atlantic however continues vigorously to press its contribution claim before us as it did below. It points to the jury's answers to written interrogatories Nos. 6 and 7 where the jury found Erie, as well as Atlantic, to have been negligent, and Erie's negligence to have been a substantial factor in bringing about plaintiff's injuries. Atlantic's contribution claim, so far as the equities are concerned, is appealing. But the controlling law is to the contrary.

Plaintiff having been injured aboard a vessel upon navigable waters, clearly general maritime law controls. *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, 628 (1959); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953). The Supreme Court has expressly held that under general maritime law there is no contribution among joint tort

feasors in a non-collision case, noting that "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-87 (1952).

Atlantic urges a variety of arguments, not without ingenuity, which add up to an invitation to us either to ignore *Halcyon* or to urge the Supreme Court to overrule it. We decline the invitation and adhere to the view expressed by this Court, through Judge Friendly, in *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1338 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969):

> "So long as *Halcyon* v. *Haenn* . . . remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court . . ."

For substantially the same reasons, we likewise decline Atlantic's invitation to permit "supplementation" of general maritime law with the New Jersey Joint Tortfeasors Act, N.J. Rev. Stat. §2A:53A (1952). Aside from the controlling bar of *Halcyon* to contribution in a non-collision case, we note that it is doubtful that the New Jersey statute is applicable to a third party action against the employer of an injured plaintiff. *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954). And in any event, Atlantic's basic argument that a state statute on contribution may be applied to fill a void in federal maritime law completely misses the point of *Halcyon*. There the Supreme Court did not create a *void* in the maritime law; it squarely held there is *no right of contribution* among tort feasors in a non-collision case.

We hold that Judge Cooper correctly dismissed Atlantic's third party complaint against Erie.

III.

Finally, Atlantic claims that the trial judge erred in refusing to set aside the $200,000 verdict as excessive and it urges us to order a remittitur.

Plaintiff, 37 years of age, sustained serious and painful injuries to his face, head, both legs and back. He has a 50% permanent disability in the use of his right leg and a 35% disability in the use of his left leg and low back. He was hospitalized for five weeks and was out of work for approximately one year following the accident. His annual wages were roughly $6,000. His life expectancy was 35 years, his working expectancy 22 years. His hospital and medical expenses were approximately $3,000. While he has returned to his former job, the record clearly establishes the permanency of his injuries, the diminution of his prospective earnings and the extent of his pain and suffering, past and future.

We note that the trial judge, who, along with the jury, was in a better position than we to observe plaintiff's demeanor and to assess his injuries, had this to say:

> ". . . we can well understand how the jury came to regard plaintiff's testimony as forthright, clean and without exaggeration. That portion of the entire trial record which concerns itself with the pain and suffering endured, and clearly to be anticipated, demonstrates experiences of deep-seated unremitting and excruciating pain, both physical and mental, over an extensive period of time."

We hold that the verdict, while substantial, was not excessive. It was not "so high that it would be a denial of justice to permit it to stand." *Dagnello* v. *Long Island R.R. Co.*, 289 F.2d 797, 806 (2 Cir. 1961). Nor was it "fantastic." *LaFrance* v. *New York, N. H. & H. R.R. Co.*, 292 F.2d 649, 650 (2 Cir. 1961), *aff'g* 191 F. Supp. 164, 168-71. See also *Gasperino* v. *Larsen Ford, Inc.*, 426 F.2d 1151, 1154 (2 Cir. 1970); *Bazydlo* v. *Placid Marcy Co.*, 422 F.2d 842, 843 (2 Cir. 1970); *Diapulse Corp. of America* v. *Birtcher Corp.*, 362 F.2d 736, 744 (2 Cir.), *cert. dismissed*, 385 U.S. 801 (1966).

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April one thousand nine hundred and seventy-one.

Present:

Hon. J. Joseph Smith,
Hon. Leonard P. Moore, Circuit Judges,
Hon. William H. Timbers, District Judge.

Theodore Benazet,

Plaintiff-Appellee,

v.

Atlantic Coast Line Railroad Company,

Defendant and Third-Party Plaintiff-Appellant,

v.

Erie Lackawanna Railroad Company,

Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and is hereby affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

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Supreme Court of the United States

October Term, 1970

No. 71-1074

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and
THEODORE BENAZET,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 21, 1971

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Supreme Court of the United States

October Term, 1970

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and
THEODORE BENAZET,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Atlantic Coast Line Railroad Company (Atlantic) seeks a writ of *certiorari* to review a decision of the United States Court of Appeals for the Second Circuit in the case of *Benazet* v. *Atlantic Coast Line R.R.*—F.2d—(1971) Docket Nos. 35278, 35279, insofar as the decision affirmed an order entered by the United States District Court for the Southern District of New York dismissing Atlantic's third party claim against Erie Lackawanna Railroad Company (Erie) for contribution in the payment of a $200,000 judgment entered against Atlantic and in favor of Theodore Benazet (Benazet).

Opinions Below

The opinion and order of the District Court (Cooper, U.S.D.J.) are reported at 315 F.Supp. 357 and printed as Appendix A, pp. A1-A14, *infra.* The decision of the Court

of Appeals affirming the order of the District Court is printed as Appendix B, pp. B-1-B-8, *infra*.

Jurisdiction

The decision of the Court of Appeals affirming the order of the District Court was filed and entered on April 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Should this Court establish a right to contribution under maritime common law in non-collision cases?

2. Should a District Court sitting in diversity jurisdiction follow a state rule which applies a state statute granting a right of contribution between joint tortfeasors in actions arising from torts committed on navigable waters within the state?

Statutes Involved

New Jersey Joint Tortfeasors Contribution Law, §3 (N.J. Rev. Stat. 2A:53A-3) which provides:

> "Judgment against joint tortfeasor; contribution. Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share; but no person

shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought." L.1952, c. 335, p. 1075, §3.

Statement of the Case

Jurisdiction in the District Court rested on diversity of citizenship of the parties.

The action was commenced on May 5, 1966 by Benazet, a resident of New Jersey, against Atlantic, for injuries sustained by him on July 30, 1964 when he fell while working on a box car owned by Atlantic, but in the custody of Erie. Benazet was employed by Erie as a yard brakeman. The box car was being moved from the shore at Jersey City, New Jersey over a float bridge to Erie's car float, which was attached to the float bridge and floating on the Hudson River. Benazet fell in the process of tightening the hand-brake because both the footboard on which he was standing and the brake-wheel supports broke. The evidence showed that the footboard was decayed and that the brake-wheel supports had been damaged and improperly repaired somewhere in the course of the car's passage through many railroad systems. The evidence also showed that the defects should have been readily apparent and that Erie failed to discover them although it had a duty to inspect the car on receipt in interchange from a connecting line.

Atlantic impleaded Erie on the ground that Erie was negligent and liable to Atlantic for contribution or indemnity. Erie answered and participated as a third party defendant in the trial.

After the completion of the trial, the jury found that Atlantic was negligent. It also found that Erie was negligent and that Erie's negligence was a substantial factor in bringing about Benazet's injuries. The jury awarded a verdict of $200,000 to Benazet.

Erie moved for a post-trial order dismissing Atlantic's third party complaint as a matter of law on the ground that no right of contribution existed under maritime law or through supplementation of maritime law with state law.

The opinion and order of Cooper, J. filed July 2, 1970 (315 F. Supp. 357; Appendix A, pp. A1-A-16, *infra*) dismissed Atlantic's third party claim against Erie for contribution as a matter of law. This order was affirmed by the Second Circuit Court of Appeals (Smith, and Moore, C.J.J. and Timbers, D.J.) in an order and judgment filed April 23, 1971 (Appendix B, pp. B-1-B-10, *infra*).

Reasons for Granting the Writ

The reasons why this Court should now review and reverse the decision of the Court of Appeals may be summarized as follows: although the jury found that Erie was negligent and that its negligence was a substantial factor in bringing about Benazet's injuries, the Court of Appeals held that it was precluded from awarding contribution by this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp., infra;* the Court of Appeals decision conflicts with rulings in two other Circuits, and the Court of Appeals refused to follow this Court's decisions which permit supplementation of maritime law with state law where no maritime rule exists.

A. This Court should establish a rule of maritime law providing a right to contribution in non-collision cases.

The Court of Appeals incorrectly assumed that it could not award contribution in a non-collision case under maritime law because of this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282

(1952), in which case, this Court, in anticipation of Congressional action, declined to fill the void in the maritime law and permit contribution in a non-collision case. This Court should now undertake to consider the very question which it deferred in *Halcyon* in order to harmonize maritime law with tort concepts which are today universally accepted by statute and by decision in other fields of the law.

1. *This Court should not refrain any longer from establishing such a right to contribution in deference to Congress.*

This Court indicated, in 1952, in *Halcyon* that it would refrain from establishing a right of contribution in maritime law because Congress had passed a considerable amount of legislation in the area and should have the opportunity to decide this question as well. Nineteen years have passed, but Congress has not acted.

In the interim, this Court has moved forward to establish other important rules of maritime law without deferring to possible Congressional action. In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) this Court did not hesitate to shape a maritime right of action for wrongful death despite even greater Congressional activity in that area. The argument of Congressional preclusion was strongly rejected. *Moragne* at 405, n. 17. In a series of cases beginning with *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) this Court established a broad new rule of maritime indemnity even though the interests involved were virtually identical to those which *Halcyon* left for resolution by Congress.

The reasoning which convinced the Court that it should act in those instances is equally compelling here. Principles of ordinary justice dictate that where a party is found to be negligent and his negligence is found to have contributed

to plaintiff's injury, he should not emerge scot-free merely because plaintiff has elected to bring his action against the other tortfeasor. This theory is well established in railroad law where courts have enforced a right to contribution among joint-tortfeasors. *Chicago, R.I. & P.R. Co.* v. *Chicago & N.W. Ry. Co.*, 280 F.2d 110 (1960) cert. den. 364 U.S. 931 (1961). It is submitted that the fact that the accident happened on a float instead of a railroad track should not be determinative of the existence of a right to contribution.

2. The establishment of a right to contribution will harmonize areas of maritime law which are presently irreconcilable.

It was indicated in *Halcyon* that a maritime right of divided damages would be available in collision cases but that contribution in any form was not otherwise available under the state of the law at that time. No rationale for this distinction was stated. Subsequently, however, in *Ryan* and its progeny a completely new theory of maritime *indemnity* was created resulting in a complete shifting of loss if some form of contract with, or for the benefit of, a party can be found. This right of indemnity was not in existence before *Ryan* was decided. It would be equally as reasonable, if not more so, for this Court, at this time, to establish a right to contribution in non-collision cases.

As a result of the present state of the law, in cases of jointly caused injury, the distribution of the ultimate burden of compensating the injured party is arbitrarily dependent on whether the injury was caused in a collision or not, or whether some form of contractual obligation between the tortfeasors can be found. Where a collision is involved, damages are divided even if the joint tortfeasors are not equally at fault. Where the injury does not arise from a collision and the injured party sues only one of two joint

tortfeasors, the burden of compensation falls either entirely on the chosen defendant or, if a "warranty or workmanlike service" running to the defendant can be found, shifts entirely to the other joint tortfeasor.

It has been widely suggested that this Court must decide the question which it put aside in *Halcyon* and establish a right of contribution if consistency and rationality are to prevail in maritime personal injury actions. By granting a right of contribution in all maritime actions the difficulty of determining whether a *Ryan* implied warranty of workmanlike service applies in a given case would be eliminated. A distribution of loss in proportion to fault would be permitted rather than the arbitrary imposition of the entire loss on one party. The suggested rule would be far simpler to administer than the *Ryan* warranty theory, and it would thereafter be unnecessary for this Court to determine whether and to what extent counter warranties should be created to offset the *Ryan* warranty. See Gilmore & Black, *The Law of Admiralty* 367; Hart & Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 515 (tentative ed. 1958), Proudfoot, "The Tar Baby": Maritime Personal Injury Indemnity Actions, 20 Stan. L. Rev. 423, 425-26 and 445 (1968); Currie, Federalism and the Admiralty, "The Devil's Own Mess", The Supreme Court Rev. 158, 212-13 and 220-21 (1960); Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers, 39 Cornell L. Rev. 381 at 421-22 and 424 (1954).

3. *The rule of stare decisis does not prevent this Court from considering this question; it was not decided in Halcyon.*

It is clear that the *Halcyon* decision is not entitled to *stare decisis* effect since no rule was articulated there. *Halcyon* can only be read as indicating that the Court was unwilling to establish a rule at the time of decision because

of the particular circumstances prevailing then. The Court gave no indication that it did not intend to reserve its power to establish such a rule at a later time.

Even if the Court's failure to articulate a rule is itself a "rule", it would not be entitled to *stare decisis* effect when measured against the standards for *stare decisis* set forth in *Moragne, supra,* at 403-5. The allowance of contribution could not disturb the confidence of people in their ability to predict the legal consequence of their actions. As has been seen, the failure to provide a maritime right of contribution in non-collision also:

> . . . "rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and . . . has produced litigation-spawning confusion in an area that should be easily susceptible to more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne* at 404-5.

B. The decision of the Court of Appeals conflicts with decisions of other Courts of Appeals.

The Court of Appeals stated that "Atlantic's contribution claim, so far as the equities are concerned, is appealing." The Court felt, however, that it was prevented from awarding contribution by *Halcyon,* citing the view expressed through Judge Friendly in *McLaughlin* v. *Trelle-*

borgs Angfartygs A/B, 408 F.2d 1334 (2d Cir.), *cert. denied*, 395 U.S. 946 (1969):

> "So long as *Halcyon* v. *Haenn* . . . remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court . . ." 408 F.2d at 1338.

The Court of Appeals for the Fifth Circuit has also indicated its dissatisfaction with *Halcyon*. In *D/S Ove Skou* v. *Hebert*, 365 F.2d 341 (5th Cir. 1966) the Court through Judge Brown noted that "it was not undertaking to rule for all time that . . . there might never be an acceptable, equitable basis for distributing the burden of a loss resulting from the operational cooperation of breaches or wrongs of several parties. . . ." More recently, in *Horton & Horton, Inc.* v. *T/S J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), *cert. denied sub nom. Horton & Horton, Inc.* v. *Vaughan Marine, Inc.*, 400 U.S. 993 (1971) and *Watz* v. *Zapata Off-Shore Co.*, 431 F. 2d 100 (5th Cir. 1970) the Court of Appeals for the Fifth Circuit decided that the *Halcyon* rule that there was no right contribution in non-collision cases was only *dicta*. The Court of Appeals awarded contribution in both cases.

The Court of Appeals for the Third Circuit allowed contribution in a non-collision case decided after *Halcyon*. In *Crain Bros. Inc.* v. *Wieman and Ward Co.*, 223 F.2d 256 (3rd Cir. 1955), contribution was awarded where damage to cargo was caused equally by unseaworthy barges and by the negligence of the charterer of the barges. No mention of *Halcyon* was made in the decision.

Thus there is no conflict between the Circuits as to the unsoundness of the *Halcyon* rule. The conflict has arisen because the Second Circuit concludes that it cannot award contribution "as long as *Halcyon* remains on the books", while the Fifth Circuit has interpreted *Halcyon* very narrowly and the Third Circuit has simply ignored it.

C. The Court of Appeals erred in failing to follow the New Jersey rule which would apply a New Jersey statute creating a right of contribution.

The Court of Appeals incorrectly assumed that the failure of this Court to establish a right to contribution in *Halcyon* precluded it from supplementing maritime law with a New Jersey statute which would permit contribution.

1. *The Court of Appeals improperly applied Halcyon as a bar to supplementation.*

The Court of Appeals mistakenly thought that *Halcyon* prevented it from following the New Jersey rule which supplements maritime law with a New Jersey statute, N.J. Rev. Stat. §2A:53A (West 1952) ("the Joint Tortfeasors Act"), permitting contribution among joint tortfeasors.

The Court of Appeals' conclusion is incorrect for several reasons. First, *The Harrisburg*, 119 U.S. 199 (1886) clearly established that no maritime right to an action for wrongful death existed in maritime law, yet during the long period of vitality of *The Harrisburg* it was never suggested that it precluded the application of state wrongful death statutes to supplement maritime law. Second, the arguments of Congressional preclusion and deference to legislative expertise should not be construed to prevent the application of a state statute in this case any more than they prevented this Court from establishing a maritime action for wrongful death in *Moragne*. Finally, in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1954), this Court decided not to establish a rule concerning maritime insurance contracts, citing *Halcyon*, but indicated that state laws might be applied. *Id.* at 320-21.

2. *Supplementation should be allowed where state interests are strong and no federal right would be abridged.*

This Court has often applied state laws to supplement maritime law where state interests are strong and no federal right would be abridged. See, e.g., *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co., supra.*

Here there is no possibility that any federal right might be abridged, for the Joint Tortfeasors Act cannot be used to prevent Benazet from a full recovery. *Tino* v. *Stout,* 49 N.J. 289, 229 A.2d 793 (1967). On the contrary, New Jersey has a strong interest in seeing that contribution is awarded to do justice to Atlantic and to insure that Erie does not escape all liability for its own negligence. Cf. *Frueh* v. *Kupper,* 54 N.J. Super. 296, 148 A.2d 743 (1959), where the New Jersey Superior Court unhesitatingly applied the Joint Tortfeasors Act to supplement maritime law.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Of Counsel
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July 21, 1971

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1404

THEODORE BENAZET,

against *Plaintiff,*

ATLANTIC COAST LINE RAILROAD COMPANY,
Defendant and Third-Party Plaintiff,

against

ERIE LACKAWANNA RAILROAD COMPANY,
Third Party Defendant.

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IRVING BEN COOPER, D. J.

Opinion

Plaintiff Benazet brought suit against defendant Atlantic Coast Line Railroad Company (Atlantic) for damages suffered as a result of his fall from a railroad boxcar owned by Atlantic claiming Atlantic negligently released the car into commerce in a defective condition and failed to inspect, repair and warn of the defective condition. This action was removed to this Court from the Supreme Court, New York County, by Atlantic, federal jurisdiction resting upon diversity of citizenship. Thereafter, Atlantic impleaded plaintiff's employer Erie Lackawanna Railroad Company (Erie) asserting that Erie was in possession of the car at the time of the accident and was negligent in failing to properly inspect the car so as to discover any defective condition and, thus, liable either in contribution or indemnity for either one-half or the full amount, respectively, of any judgment plaintiff might recover against Atlantic.

Following a four day trial, the jury on April 16, 1970 returned a verdict in favor of plaintiff in the amount of $200,000. Judgment was entered as to the main claim on April 30, 1970 pursuant to Rule 54(b), F.R.Civ.P.

We are here faced with certain legal contentions the resolution of which will determine the third party action. In connection with these questions of law including jurisdiction, motions have been filed by all parties herein to amend the pleadings to conform with the proof. Finally, both defendant and third party defendant have moved on several grounds for an order setting aside the verdict or in the alternative granting a new trial.

• • • • •

On July 30, 1964 Benazet was injured when, in the course of his duties as a brakeman employed by Erie, he attempted to tighten a handbrake on a railroad boxcar owned by

Atlantic. Plaintiff claimed, and the jury evidently so found, that the accident and consequent injuries occurred generally as follows: as he was applying the handbrake a rotted foot board gave way under his foot causing his weight to go upon the handbrake assembly which in turn broke away from the car as a result of the defective condition of the brackets affixing the handbrake assembly to the freight car resulting in plaintiff's fall. Proof at trial which the jury was entitled to credit, established that the brackets were defective in that they had fizzures over an inch long, a condition requiring years to develop. Some time prior to the accident an attempt had been made to repair the breaks in each bracket by spot welding, a highly improper procedure at best and performed so poorly herein that one witness described it as a "butcher job."

This car owned by Atlantic left its possession on June 4, 1964, less than two months prior to the accident. Between that date and July 27, 1964 when it was delivered to Erie, it is acknowledged that it had been in the possession of and operated over approximately seven different railroads in different parts of the country. Erie had this car in its possession for three days prior to July 30, 1964, the date of plaintiff's injury. Nevertheless, based on the testimony with respect to the age of the defects, we believe there was adequate evidence to support the jury's requisite finding on the element of proximate causation that Atlantic was either the cause or knew or should have known of the existence of the defects in the brackets of the car it placed in commerce and that there was no superceding cause of the accident.

At the time of the accident the boxcar from which plaintiff fell was on a carfloat owned by Erie. The carfloat was a barge (having no motor power) with tracks to accommo-

date railroad cars. This carfloat was moored on the Hudson River near the New Jersey shore next to an Erie float bridge—a floating pier used for the loading or unloading of carfloats. The carfloat was fully loaded and ready for its scheduled towing across New York Harbor to connect with the Long Island Railroad. At the time of his fall to the dock of the carfloat, plaintiff was tightening the handbrake involved here in order to make the last boxcar more secure for that voyage.

EXCESSIVENESS OF THE VERDICT; OTHER POST TRIAL MOTIONS

At the outset we dispose of defendant's and third party defendant's various motions to set aside the verdict and grant a new trial, which we denied after the jury's verdict but with leave to renew in writing.

As to the motions addressed to the claimed excessiveness of the jury's verdict: we can well understand how the jury came to regard plaintiff's testimony as forthright, clean and without exaggeration. That portion of the entire trial record which concerns itself with the pain and suffering endured, and clearly to be anticipated, demonstrates experiences of deep-seated unremitting and excruciating pain, both physical and mental, over an extensive period of time.

Wages lost before trial, loss of future wages and increments thereon (the reasonable expectancy of working years was 22 as agreed upon), the medical expense actually incurred and reasonably to be anticipated, were closely calculated and met with no disturbing opposition. See *Grunenthal* v. *Long Island R. Co.*, 393 U.S. 156 (1968).

We were very strict in holding the jury to these items of damage only which the law countenances: [From the trial

judge's draft of the charge to the jury (court reporter's minutes not presently available).]

> "Now, what I have been laying down to you as to the law of damages is the law's formula for the assessment of damages. You have no power to alter that formula. Yes, you have the power under the law to determine the proper amount, if you should so find, of each item of damage, but you do not have the legal power to substitute another formula for the only one that the law recognizes. On all the items of damage you are to be guided by your common sense. As with everything else in this case, you are to be guided by what life has taught you, the experiences you have had, and such an award as you make must bear a reasonable relationship to the nature and extent of the injuries which you find, and all these items of damage then are to be totaled up into one lump sum."

With regard to the remaining motions: as indicated by our factual recital above, there was sufficient credible evidence of record to show liability on the part of defendant; the verdict was neither contrary to law; nor against the weight of the evidence.

Maritime Jurisdiction

After two days of trial and on the eve of the Court's charge to the jury, Erie served and filed a memorandum of law contending for the first time that it had only then come to realize (and its hasty research confirm) that this case was properly one of maritime jurisdiction. Prior thereto, and in accordance with the pleadings, all parties proceeded under the assumption that New Jersey law governed both the main action and the claim over, as the requests to charge submitted by all parties at that time reflect.

Opinion

Having insufficient time to resolve the difficult question of which law properly governed, we resolved, with the advance approval of all parties, to frame our charge and propound special interrogatories to the jury so as to prevent, hopefully, any possible need for a retrial regardless of the law eventually found applicable to the precise factual area defined herein. In substance, the jury specifically found Atlantic negligent and such negligence a proximate cause of plaintiff's injuries; plaintiff was not contributorily negligent; damages of $200,000; Erie also negligent and such negligence likewise a proximate cause of plaintiff's injuries.[1]

The jury's finding that plaintiff was not contributorily negligent, amply supported by the trial record, removed any problem as to whether any such negligence would be a complete bar or whether, instead, comparative negligence under maritime law was applicable. The remaining question is whether, despite the jury's finding of negligence by Erie as well as Atlantic, Erie is nevertheless entitled to dis-

---

1. The interrogatories propounded and the jury's responses in full are as follows:

1. Was the Atlantic Coast Line Railroad negligent? A. Yes.

2. If yes, did such negligence contribute in any degree to the plaintiff's injuries? A. Yes.

3. Did plaintiff establish that he exercised due care for his own safety? A. Yes.

4. If yes on questions #1 and #2 what is the total amount of plaintiff's damages? A. $200,000.

5. If your answer on question #3 was no, has defendant established that the planitiff was contributorily negligent? If yes, what percent? [not answered].

6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent? A. Yes.

7. If so, was such negligence a substantial factor in bringing about plaintiff's injuries? A. Yes.

missal of the third party action because: (1) either maritime law governs and contribution is not permitted in a non-collision suit such as this, or, (2) regardless of whether maritime law governs, under the New Jersey Joint Tortfeasors Contribution Act, 2A N.J.L.A. §53A, contribution is not available from an employer such as Erie against whom plaintiff's exclusive remedy is a compensation act, in this case the Longshoreman's and Harbor Workers' Act.[2]

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2. Atlantic informed the Court and Erie during the course of trial that it withdrew its cause of action for indemnity. Accordingly, the Court charged the jury only on Atlantic's third party claim for contribution and the interrogatories submitted to the jury did not inquire into the question of active-passive or primary-secondary negligence as between Atlantic and Erie. No objection was taken by Atlantic to either the Court's charge on the claim over or to the interrogatories propounded.

This withdrawal was so understood by Lloyd W. Roberson, Esq., counsel for Erie, who stated on the first page of a memorandum dated April 27, 1970 in support of his motions to dismiss, set aside the verdict and for a new trial: "Before submission of the case to the jury the indemnity claim was withdrawn."

Nevertheless, James J. Mennis, Esq., counsel for Atlantic, stated for the first time in the course of an affidavit (pages 4-5 thereof) dated May 8, 1970 in support of various post-trial motions to set aside the verdict and judgment thereon and grant a new trial:

> "However, the only comment deponent recalls making in response to the court's reference to indemnity, was that defendant Atlantic Coast Line Railroad Company was relying principally on its right to contribution. Deponent has no recollection of withdrawing defendant Atlantic Coast Line Railroad Company's right of indemnity. . . ."

In response Mr. Roberson avers:

> "6. As the court will recall, at a time when all counsel were in the robing room with the presiding judge, presiding Judge Irving Ben Cooper indicated to the attorney for the plaintiff that the attorney for the plaintiff would probably want to amend his pleadings to conform to the proof. Honorable Irving Ben Cooper also asked Mr. Mennis, counsel for the defendant and third party plaintiff, whether he was continuing his indemnity claim. Mr. Mennis, stated he was withdrawing the claim based on indemnity.

Opinion

There is undisputed diversity of citizenship jurisdiction over this action. Jurisdiction under 28 U.S.C. § 1332 being present, we believe it unnecessary, even with maritime law governing, that the parties amend their pleadings

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7. The effect of such announcement was to set the pattern as to the areas in which jurors would be asked specific questions or give responses to specific interrogatories.

8. After the statement of withdrawal by Mr. Mennis, there was no further consideration given to charging the jury relative to the same or proposing any specific interrogatories concerning such indemnity.

* * * * *

10. Furthermore, such withdrawal had a bearing on the approach that I took with the jury. A party in the position of the defendant is much less likely to obtain an affirmative finding of negligence on the part of the third party defendant where the jurors feel that an indemnity may be the remedy. The defendant and third party plaintiff is having its cake and eating it too if it were allowed to re-assert the indemnity claim in the present posture of the action." Affidavit of Lloyd W. Roberson, Esq., May 12, 1970.

Let's look at the record:

"The Court: Now Mr. Mennis—on the record—we did so much, I think we accomplished a lot off the record during the course of trial, but we can place on the record what we have agreed to.

Let the record show that you agreed to withdraw against Erie your claim for indemnity and to rely only on the claim of contribution.

Mr. Mennis: Yes, that's correct."

Minutes of Benazet v. Atlantic Coast Line v. Erie, April 16, 1970 (not transcribed as of the date of this opinion).

We need not rest solely upon this unequivocal withdrawal, however, for, in any event, the nature of the claims of negligence asserted against Atlantic by plaintiff and, in turn, against Erie by Atlantic, combined with the evidence developed at trial and the jury's finding that both were negligent appears to preclude the possibility of indemnity being successfully maintained. Atlantic's negligence was not "passive" or "secondary" and Erie's negligence "sole," "active" or "primary." See generally Gilmore & Black, The Law of Admiralty at 367-74 (1957). We believe the active-passive standard would be

to assert the possible additional jurisdictional basis in admiralty, 28 U.S.C. § 1333.[3] Accordingly, the motions to amend are denied.

Plaintiff's fall from the boxcar occurred on board a carfloat, a vessel then moored to a floating pier in navigable waters, loaded and scheduled to be towed across New York Harbor. While the question is not wholly free from doubt, we conclude that federal maritime law is the substantive law governing this case, both as to the prime suit and the claim over. See *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953); *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, 628 (1958). See also, *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 338-40 (1953) (a strikingly similar fact situation in which the Supreme Court held O'Rourke could not maintain an FELA action against his employer, his exclusive remedy held to be the Harbor Workers' Act); *Nogueira* v. *N.Y., N.H. & H. R. Co.*, 281 U.S. 128, 134 (1930). Indeed, both Atlantic and Erie appear to so concede. See Memorandum of Law of Defendant and Third Party Plaintiff,

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controlling on a claim of indemnity in this situation where the employer third party defendant has no contractual relationship with the defendant and third party plaintiff and where the defendant third party plaintiff cannot be held liable without fault. Compare *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 132-33 (1956). There is no warranty running from Erie to Atlantic which might justify finding a contractural basis for indemnity. Compare *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 320-21 (1964).

3. Where the suit is, as here, *in personam*, it may be brought in federal court under the head of diversity of citizenship jurisdiction on the law side of the court (entitling one to a jury trial) on the basis that "Congress since 1789, in giving Federal District Courts original jurisdiction of civil cases in admiralty, has saved 'to suitors in all cases all other remedies to which they are otherwise entitled.'" *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines Ltd.*, 369 U.S. 355, 359-60 (1962).

May 11, 1970, p. 1; Memorandum of Law of Third Party Defendant, April 27, 1970.

CONTRIBUTION

Having found maritime law controlling, we are faced with the perplexing and often not wholly consistent body of law which frequents this area and from which we must obtain our guidance as to whether contribution is available. The leading case is *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952) in which the Supreme Court was faced with a conflict among the Circuits as to the existence and extent of contribution in non-collision maritime torts. A ship owner, sued for negligence and unseaworthiness by an injured employee of a shoreside contractor engaged by the ship owner to make repairs on a ship moored in navigable waters, impleaded the contractor seeking contribution on the ground the contractor's negligence had contributed to the injuries.

It was the conclusion of the Supreme Court that:

> "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. . . . Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

> In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it inappropriate for us to do so." *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. at 285-87.

This decision still stands and Congress has not acted to extend the law of contribution to non-collision matters. There has, however, been considerable erosion of the effect of *Halcyon*. Thus, in subsequent decisions the Supreme Court held contractually-based indemnity actions were maintainable although actions for contribution between joint tortfeasors were not. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). See also, Gilmore & Black, The Law of Admiralty at 367-74 (1957).

Conceding that maritime law is applicable and that *Halcyon*, while often circumvented, has not been overruled, Atlantic argues that there is a void in federal maritime law on the subject of contribution in non-collision cases and that, under settled principles, state law—here, the New Jersey Joint Tortfeasors Contribution Act—may be applied to fill that void as a supplement to the general maritime law. In the absence of a federal provision or common law right of action state wrongful death statutes have been invoked to recover for a maritime death. See *The M/V "Tungus"* v. *Skevenard*, 358 U.S. 588 (1958); *Hess* v. *United States*, 361 U.S. 314 (1960). There, too, Congress had enacted statutes providing for wrongful death actions in a limited number of situations, but had "stopped short" of providing full coverage. However, this possible analogy to *Halcyon* and the Supreme Court decision to not extend the maritime rule of contribution was not developed by the Supreme Court in its decisions incorporating state wrongful death statutes into maritime law.

In *Frueh* v. *Kupper* v. *Frueh*, 54 N.J. Super. 296, 148 A.2d 743 (1959) the New Jersey Superior Court reasoned:

> "The question of applicability of a state joint tortfeasors act was not discussed in the Halcyon case. The accident here occurred in waters within the geographical boundaries of New Jersey. The language of the Joint Tortfeasors Act has sufficient scope to include a maritime cause of action which arises in New Jersey. This act is broadly construed." 148 A.2d at 749.

The question is a close one. We believe, however, that the wrongful death cases are properly distinguishable and that *Halcyon* is determinative of the case at bar. The Supreme Court in *The Tungus* before adopting the state right of action for wrongful death reiterated "the established principle of maritime law that in the absence of a statute there is no action for wrongful death." 358 U.S. at 590. Thus, in adopting state wrongful death statutes, the Court never held that it had the power to create such an action at common law, but would refuse to do so because it was not convinced of its value and believed Congress by its selective action had expressed a contrary intent.

In contrast, in considering its power to fashion an extension of the existing maritime rule of contribution, the Supreme Court in *Halcyon* stated "we would feel free to do so here if wholly convinced that it would best serve the ends of justice." 342 U.S. at 285. Thus, as we see it, the *Halcyon* ruling that "[i]n view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so," cannot be seen as merely leaving a void in federal maritime law respecting contribution which a court is free to fill by the adoption of

a state contribution statute. We believe the Supreme Court has stated that with much Congressional legislation already in existence in this area, the decision whether to extend a right of contribution here and, if so, in what manner, must be left to the Congress in order to accommodate the "many groups of persons with varying interests . . . vitally concerned with the proper functioning and administration of these Acts as an integrated whole."[4] 342 U.S. at 286.

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4. Even if the New Jersey Joint Tortfeasors Contribution Act were adopted, the result would be far from clear. The Joint Tortfeasors Act is inapplicable to a third party suit against the employer of the injured plaintiff, at least where workmen's compensation exists and is the employee's exclusive remedy against his employer. See *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A 2d 752 (App. Div. 1954). The Supreme Court in adopting state wrongful death statutes holds that the right must be enforced as an integrated whole, with whatever conditions and limitations the creating state has attached. See *The Tungus* v. *Skovgaard*, 358 U.S. at 591-94.

Here, the third party suit is against plaintiff's employer. While state workman's compensation is inapplicable, plaintiff is covered by the Longshoreman's and Harbor Workers' Compensation Act, 33 U. S.C. § 901 et. seq. In the virtually identical fact setting of *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1952) the Supreme Court held that railroad employee's remedy was under the Harbor Workers' Act exclusively, and not under the F.E.L.A.

Since *O'Rourke*, however, longshoremen, covered by the Harbor Workers' Act, have been permitted to sue their own employer, where that employer is also the shipowner, for unseaworthiness, despite the provision of the Harbor Workers' Act that the liability of an employer under the Act "shall be exclusive and in place of all other liability." See *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731 (1967). Although plaintiff Benazet is not a longshoreman, the Supreme Court's reliance in *Jackson* on its expensive grant of the benefits of the seaworthiness doctrine to a wide range of maritime employees combined with its announced desire to avoid "a harsh and incongruous result" leads us to conclude that this plaintiff would probably be entitled to maintain a suit based on unseaworthiness of the carfloat owned by his employer Erie.

If we are correct, then the Harbor Workers' Act would not be plaintiff's exclusive remedy and the New Jersey Joint Tortfeasors

Conclusion

Accordingly, we hold that the third party claim for contribution must be dismissed as a matter of law.

So Ordered:

New York, N. Y.
July 2, 1970

United States District Judge

Law might in this context permit an action for contribution against Erie. If so, then two questions would still remain: (1) is unseaworthiness necessarily present here in light of the factual setting of a defective boxcar on board Erie's carfloat and the jury's finding that Erie was negligent? (2) If yes, might Erie nonetheless be entitled to indemnity from Atlantic for any liability to plaintiff on the ground Atlantic was primarily responsible and, if so, would this not preclude joint contribution?

We find it unnecessary to travel this tortuous path to a possible conclusion for the reason already set forth—we believe *Halcyon* determinative of the question here presented.

Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 70,670

Civil Action—No. 66 C 1404

THEODORE BENAZET,

Plaintiff,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff,

against

ERIE LACKAWANNA RAILROAD COMPANY,

Third-Party Defendant.

The above entitled action having been tried before Judge Irving Ben Cooper and a jury on April 13, 14, 15 and 16, 1970; and the jury having answered the following stated interrogatories in the following manner:

1. Was the Atlantic Coast Line Railroad negligent? A. Yes.

2. If yes, did such negligence contribute in any degree to the plaintiff's injuries? A. Yes.

3. Did plaintiff establish that he exercised due care for his own safety? A. Yes.

4. If yes on questions #1 and #2 what is the total amount of plaintiff's damages? A. $200,000.00

5. If your answer on question #3 was no, has defendant established that the plaintiff was contributorily negligent?

6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent? A. Yes.

If so, was such negligence a substantial factor in bringing about plaintiff's injuries? A. Yes.

and having returned a verdict in favor of Theodore Benazet in the sum of $200,000.00, against defendant Atlantic Coast Line Railroad Company, and it further appearing that Rule 54b of the Federal Rules of Civil Procedure is applicable in that plaintiff is in monetary need of his money judgment and there is no just reason why judgment ought not be entered for plaintiff even though judgment as between defendant and third party defendant is not entered simultaneously herewith, and there being no prejudice to the defendant or third party defendant by the entry of judgment herein,

It is, on this 30th day of April, 1970,

ORDERED, that judgment in the sum of $200,000.00 be entered in favor of Theodore Benazet plaintiff, and against Atlantic Coast Line Railroad Company, defendant, with costs.

IRVING BEN COOPER
Judge U.S.D.C.

Judgment entered: 4/30/70

JOHN LIVINGSTON
Clerk

APPENDIX B

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 474-475—September Term, 1970.

(Argued March 16, 1971 Decided April 23, 1971.)

Docket Nos. 35278, 35279

THEODORE BENAZET,

Plaintiff-Appellee,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY,

Third-Party Defendant-Appellee.

Before:

SMITH AND MOORE, *Circuit Judges,*
AND TIMBERS,* *District Judge.*

Appeal from $200,000 judgment entered upon jury verdict after trial in United States District Court for Southern District of New York, Irving Ben Cooper, *District*

* Chief Judge, United States Court for the District of Connecticut, sitting by designation.

Judge, and from order dismissing third party complaint. 315 F. Supp. 357 (S.D.N.Y. 1970). Affirmed.

JOSEPH P. ALTIER, New York, N. Y. (Bromsen & Gammerman, on the brief), *for plaintiff-appellee.*

DEVEREUX MILBURN, New York, N. Y. (Carter, Ledyard & Milburn, Frank G. Kurka, James J. Mennis and Jerome L. Getz, on the brief), *for Atlantic Coast Line Railroad Company, defendant and third party plaintiff-appellant.*

LLOYD W. ROBERSON, New York, N. Y. *for Erie Lackawanna Railroad Company, third party defendant-appellee.*

TIMBERS, *District Judge*:

Appellant Atlantic Coast Line Railroad Company (Atlantic) appeals from a $200,000 judgment entered against it after a four day jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, *District Judge*, and from an order entered by Judge Cooper after trial dismissing Altantic's third party complaint against the Erie Lackawanna Railroad Company (Erie). 315 F. Supp. 357 (S.D.N.Y. 1970).

The accident occurred July 30, 1964. Plaintiff was employed as a yard brakeman by Erie. He sustained injuries while working on a box car owned by Atlantic. The box car was being moved from the shore near Jersey City, New Jersey, over a float bridge and on to a carfloat which is a barge with railroad tracks to accommodate railroad cars. The carfloat was owned by Erie. It was moored on the

Hudson River which is part of the navigable waters of New York Harbor just off the Jersey shore. Plaintiff fell from the box car to the deck of the carfloat. His fall was caused by a defective handbrake on the box car which he was attempting to tighten while standing on a footboard which had rotted and decayed. When the footboard and handbrake assembly gave way, plaintiff was catapaulted to the deck of the carfloat. No issue is raised on this appeal with respect to the defective conditions of the box car owned by Atlantic being the proximate cause of plaintiff's injuries.

Atlantic's essential claims on appeal are (1) that the case was erroneously submitted to the jury on the issue of contributory negligence; (2) that Atlantic's asserted right of contribution between joint tort feasors in a non-collision case was erroneously rejected in the dismissal of its third party complaint against Erie; and (3) that the trial judge erroneously refused to set aside the verdict as excessive. Finding no error, we affirm.

I.

We need not tarry long over Atlantic's claim that the case was erroneously submitted to the jury on the issue of contributory negligence. In the first place, in response to a written interrogatory submitted with the approval of all counsel, including Atlantic's, the jury expressly found that plaintiff was not contributorily negligent; and our independent examination satisfies us that this finding is adequately supported by the record. Furthermore, Atlantic's counsel not only did not object to the manner in which the judge submitted the issue of contributory negligence to the jury, but he participated in the formulation of the charge as given on this issue.

What happened was somewhat unusual. At the conclusion of the third day of the trial of an action that had been pending for four years, counsel for Erie submitted a memorandum of law indicating for the first time that general maritime law governed rather than the common law as all counsel and the judge had supposed up to that point. Confronted with this development at the close of the evidence and on the eve of summations and charge, Judge Cooper resorted to what strikes us as a sensible, practical method of resolving the dilemma: he invited all counsel to confer with him and to participate in the formulation of the charge and written interrogatories to be submitted to the jury, especially on the issue of contributory negligence. They did. There emerged a charge, agreed to by all counsel, under which the jury was instructed with respect to the applicable rule of contributory negligence under common law (complete bar to recovery) and under general maritime law (comparative negligence). The charge was accompanied by seven written interrogatories, also agreed to by all counsel, in response to which the jury was instructed to decide (No. 3) whether plaintiff had established "that he exercised due care for his own safety" (which the jury answered in the affirmative); or (No. 5), in the event its answer were in the negative to No. 3, whether defendant had established "that plaintiff was contributorily negligent" and, if so, "what per cent" (which the jury did not answer, having answered No. 3 in the affirmative).[1]

We have no doubt that the trial judge, if given more time to determine whether the common law or general mari-

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1. The seven written interrogatories, together with the jury's responses, are set forth in full in the District Court's opinion. 315 F. Supp. 357, 360 n. 1.

time law governed, would have preferred to have submitted the issue of contributory negligence to the jury differently. We are satisfied, however, under the circumstances that essential justice was done. And certainly Atlantic is foreclosed from claiming error with respect to a charge in which it acquiesced and to which it interposed no objection until after the return of a substantial verdict against it.

II.

Atlantic's third party claim against Erie was based alternatively on indemnity or contribution between joint tort feasors. At trial, in response to the judge's inquiry before charging the jury, Atlantic's counsel withdrew its indemnity claim. Such withdrawal was confirmed by Atlantic's counsel at the time of oral argument before us.

Atlantic however continues vigorously to press its contribution claim before us as it did below. It points to the jury's answers to written interrogatories Nos. 6 and 7 where the jury found Erie, as well as Atlantic, to have been negligent, and Erie's negligence to have been a substantial factor in bringing about plaintiff's injuries. Atlantic's contribution claim, so far as the equities are concerned, is appealing. But the controlling law is to the contrary.

Plaintiff having been injured aboard a vessel upon navigable waters, clearly general maritime law controls. *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, 628 (1959); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953). The Supreme Court has expressly held that under general maritime law there is no contribution among joint tort feasors in a non-collision case, noting that "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would

be inappropriate for us to do so." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-87 (1952).

Atlantic urges a variety of arguments, not without ingenuity, which add up to an invitation to us either to ignore *Halcyon* or to urge the Supreme Court to overrule it. We decline the invitation and adhere to the view expressed by this Court, through Judge Friendly, in *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1338 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969):

> "So long as *Halcyon* v. *Haenn* . . . remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court . . ."

For substantially the same reasons, we likewise decline Atlantic's invitation to permit "supplementation" of general maritime law with the New Jersey Joint Tortfeasors Act, N.J. Rev. Stat. §2A:53A (1952). Aside from the controlling bar of *Halcyon* to contribution in a non-collision case, we note that it is doubtful that the New Jersey statute is applicable to a third party action against the employer of an injured plaintiff. *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954). And in any event, Atlantic's basic argument that a state statute on contribution may be applied to fill a void in federal maritime law completely misses the point of *Halcyon*. There the Supreme Court did not create a *void* in the maritime law; it squarely held there is *no right of contribution* among tort feasors in a non-collision case.

We hold that Judge Cooper correctly dismissed Atlantic's third party complaint against Erie.

III.

Finally, Atlantic claims that the trial judge erred in refusing to set aside the $200,000 verdict as excessive and it urges us to order a remittitur.

Plaintiff, 37 years of age, sustained serious and painful injuries to his face, head, both legs and back. He has a 50% permanent disability in the use of his right leg and a 35% disability in the use of his left leg and low back. He was hospitalized for five weeks and was out of work for approximately one year following the accident. His annual wages were roughly $6,000. His life expectancy was 35 years, his working expectancy 22 years. His hospital and medical expenses were approximately $3,000. While he has returned to his former job, the record clearly establishes the permanency of his injuries, the diminution of his prospective earnings and the extent of his pain and suffering, past and future.

We note that the trial judge, who, along with the jury, was in a better position than we to observe plaintiff's demeanor and to assess his injuries, had this to say:

> ". . . we can well understand how the jury came to regard plaintiff's testimony as forthright, clean and without exaggeration. That portion of the entire trial record which concerns itself with the pain and suffering endured, and clearly to be anticipated, demonstrates experiences of deep-seated unremitting and excruciating pain, both physical and mental, over an extensive period of time."

We hold that the verdict, while substantial, was not excessive. It was not "so high that it would be a denial of justice to permit it to stand." *Dagnello* v. *Long Island R.R.*

Co., 289 F.2d 797, 806 (2 Cir. 1961). Nor was it "fantastic." *LaFrance* v. *New York, N. H. & H. R.R. Co.*, 292 F.2d 649, 650 (2 Cir. 1961), *aff'g* 191 F. Supp. 164, 168-71. See also *Gasperino* v. *Larsen Ford, Inc.*, 426 F.2d 1151, 1154 (2 Cir. 1970); *Bazydlo* v. *Placid Marcy Co.*, 422 F.2d 842, 843 (2 Cir. 1970); *Diapulse Corp of America* v. *Birtcher Corp.*, 362 F.2d 736, 744 (2 Cir.), *cert. dismissed*, 385 U.S. 801 (1966).

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April one thousand nine hundred and seventy-one.

Present:

Hon. J. JOSEPH SMITH,

Hon. LEONARD P. MOORE, Circuit Judges,

Hon. WILLIAM H. TIMBERS, District Judge.

THEODORE BENAZET,
Plaintiff-Appellee,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
Defendant and Third-Party Plaintiff-Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY,
Third-Party Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and is hereby affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

FILED
NOV 30 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner*,

v.

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BENAZET, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner*,

v.

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BENAZET, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion and order of the United States District Court for the Southern District of New York (App. A of Petition) are reported at 315 F.Supp. 357. The opinion of the United States Court of Appeals for the Second Circuit (App. B of Petition) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether, under the factual circumstances of this case, *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and subsequent cases should be overruled and this Court should create a right of contribution in non-collision, maritime, injury cases, despite the refusal of Congress to change the *Halcyon* rule.

STATUTE INVOLVED

The pertinent provisions of the New Jersey Tortfeasors Contribution Law are set forth in the Petition at pp. 2-3.

STATEMENT

Theodore Benazet, an employee of Respondent Erie Lackawanna Railroad, was injured on July 30, 1964, when he fell while working on a boxcar owned by Petitioner Atlantic Coast Line Railroad Company. At the time of the accident, Benazet, a yard brakeman, was attempting to tighten a handbrake on the boxcar, which was standing on Erie's carfloat moored in the Hudson River just off the coast of New Jersey.

Benazet brought suit against Atlantic based on diversity of citizenship, and Atlantic impleaded Erie on the ground that Erie was negligent for failure to inspect properly and that Atlantic was entitled to contribution. (Atlantic also claimed originally a right to indemnity but dropped this claim at the end of the

trial.) The trial court applied national maritime law, Atlantic did not contest this point on appeal, and Erie assumes that such law controls.

As District Judge Cooper noted in his opinion, the facts evidently found by the jury were that when Benazet applied the handbrake, a rotted foot board gave way, and he put his weight against the handbrake assembly which in turn broke away from the car as a result of some defective brackets. The defective condition of the brackets required "years to develop," and a repair job had been attempted in "a highly improper procedure" (Petition, p. A-3). There was no evidence that this repair job had been performed by Erie. The boxcar had left Atlantic's possession less than two months prior to the accident, had then been in the possession of at least seven different railroads, and had been in Erie's possession for only three days (*ibid.*). The jury found that both Atlantic and Erie were negligent, and that Erie's negligence was "a substantial factor" in bringing about Benazet's injuries (the same question was not posed as to Atlantic). However, as Judge Cooper specifically found, "* * * Atlantic was either the cause or knew or should have known of the existence of the defects in the brackets of the car it placed in commerce and * * * there was no superseding cause of the accident" (*ibid.*).

The District Court upheld the jury's award of $200,000 as against Atlantic and dismissed Atlantic's claim for contribution against Erie. The Court of Appeals unanimously affirmed.

ARGUMENT

I. Congress Has Refused To Change the Halcyon Rule.

Almost twenty years ago this Court was asked to hold that there was an established right to contribution between joint tortfeasors in non-collision, maritime, injury cases. It refused to do so and held instead that no such right exists.[1] The Court said that whether such a right *should* exist must "await congressional action," since Congress had theretofor "stopped short of approving the rule of contribution here urged * * *." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285, 287 (1952).

Significantly, the Court pointed out:

> Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated

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[1] Petitioner portrays *Halcyon* as deferring (Petition, p. 5) or putting aside (*id.* at 7) the issue of contribution in non-collision cases. The Court of Appeals correctly pointed out that *Halcyon* "expressly held" no such right of contribution to exist (*id.* at B-5). An admiralty rule of law can be stated positively or negatively, of course, and it is nonetheless a rule of law. *Just* v. *Chambers*, 312 U.S. 383, 391 (1941). Moreover, this Court itself has refuted Petitioner's characterizations. In *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 320 (1964), the Court said that *Halcyon* "held that maritime principles of contribution between joint tortfeasors prevailing in collision cases were not applicable in suits for contribution by a shipowner against stevedoring companies." Even the three dissenters in *Italia Societa* took the view that *Halcyon*, along with *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), held that "the system of compensation which Congress established in the Longshoreman's and Harbor Workers' Compensation Act as the sole liability of a stevedoring company to its employees prevented a shipowner from shifting all or part of his liability to the injured longshoreman onto the stevedoring company, the longshoreman's employer." 376 U.S. at 325 (footnote deleted).

> whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. *A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made.* The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. [*Id.* at 286-287; emphasis added; footnote deleted.]

The Court went on to say:

> Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties. [*Ibid.*; footnote deleted.]

Both in these and other portions of its opinion, the Court thus made two important points. First, Congress might or might not want to change the rule that no right of contribution exists, depending upon what advocates and opponents of such a rule were able to show. Secondly, the solution was peculiarly one for Congress in view of the fact that application of the rule might be limited by other maritime acts, and even if the rule were changed and applied, further decisions would have to be made, such as how contribution was to be apportioned and in what ways the new rule would be "integrated with other acts" in the maritime field.

Despite this clear invitation by the Court in *Halcyon* and subsequent cases[2] to those who advocate a change in the rule to step forward and present their case, they have failed to do so. Those organizations, labor groups, government agencies and federal departments most knowledgable in the field and most likely to be concerned about the injustices, anomalies and inconsistencies which Petitioner alleges to exist have in fact shown no concern at all about *Halcyon*. The annual reports of the Maritime Administration, for example, reveal that at no time since 1952 has the Administration discovered any of the dire consequences alleged by Petitioner. The Interior, Treasury, Justice and Commerce Departments, the International Longshoremen's Association, and the myriad other groups which regularly present their views to Congress on issues of importance in the maritime field have not urged that *Halcyon* be overruled, as surely they would have if the picture were as Petitioner paints it.

Bills *have* been introduced in Congress which would have had the effect of changing the *Halcyon* rule and allowing contribution in cases such as this one.[3] See,

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[2] The *Halcyon* case has repeatedly been approved, reaffirmed, or cited with apparent approval by this Court since it was originally decided. *E.g., Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U.S. at 408; *Madruga* v. *Superior Court,* 346 U.S. 556, 563 (1954); *Wilburn's Boat Co.* v. *Firemen's Fund Ins. Co.,* 348 U.S. 310, 320 (1955); *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.,* 350 U.S. 124, 133 (1956); *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625, 630 n. 5 (1959); *Weyerhaeuser Steamship Co.* v. *United States,* 372 U.S. 597, 603 (1963); *Italia Societa* v. *Oregon Stevedoring Co., supra,* 376 U.S. at 320; *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.,* 394 U.S. 404, 417 (1969).

[3] S. 2313, a bill "to unify apportionment of liability in cases of collision between vessels, and related casualties," was introduced in the 1st Session of the 87th Congress by Senator Magnuson on July 26, 1961, and was referred to the Commerce Committee's

by way of example, Sections 4(a), 4(b) and 9 of S. 555, printed as Appendix A to this Brief. Significantly,

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Subcommittee on Merchant Marine and Fisheries. Hearings were held by the Subcommittee on March 1 and 2, 1962. 87th Cong., 2nd Sess. Serial #53. On March 23, 1962, the bill was considered in executive session by the full Committee and ordered reported favorably with amendments not relevant here. The bill was reported by Senator Bartlett on June 15, 1962, with the title, "Unifying Apportionment of Liability in Collisions and Other Maritime Casualties." S. Rep. No. 1603, 87th Cong., 2nd Sess. (1962). On September 28, 1962, consideration of the bill was indefinitely postponed.

H.R. 7911, the companion bill to S. 2313 which shared its title, was introduced in the 1st Session of the 87th Congress by Congressman Garmatz on June 28, 1961, and was referred first to the Committee on Merchant Marine and Fisheries and then to the Subcommittee on Merchant Marine. Comments were sought and received from the General Accounting Office and the Departments of the Treasury, Commerce, Justice and State. The Subcommittee took no further action on the bill.

S. 555 (see Appendix A hereto) was similar in all significant aspects to S. 2313 of the 87th Congress, as amended by the Commerce Committee. S. 555 was introduced in the 1st Session of the 88th Congress by Senator Bartlett on January 28, 1963, and referred to the Subcommittee on Merchant Marine and Fisheries of the Commerce Committee. Hearings were held on May 20 and 22, 1963 (88th Cong., 1st Sess. Serial #22), and on December 9, 1963, the bill was considered in executive session by the Subcommittee and reported favorably to the full Committee with an amendment in the nature of a substitute. *The amendment changed the bill so as to make it applicable solely to collision cases.* The bill, as reported, was considered by the full Committee in executive session on December 10, 1963, but no further action was taken.

H.R. 1070 was identical in language to H.R. 7911 of the 87th Congress and similar to S. 555 of the 88th Congress. H.R. 1070 was introduced in the 1st Session of the 88th Congress by Congressman Garmatz on January 9, 1963, and referred to the Committee on Merchant Marine and Fisheries. Comments were sought and received from the General Accounting Office and the Departments of the Treasury, Commerce, Justice and State. The bill was not even referred to a Subcommittee, and no further action was taken.

however, the only committee report available[4] indicates that Congress was *not* concerned about the *Halcyon* rule, despite the plain language of these bills. Even more to the point, *the bills were never even reported out of committee, much less approved by Congress.*

Thus, whether we treat the history of these bills as evidence that Congress is disinterested in changing the present rule or as an outright rejection by Congress of any change, the message is clear: on a question which this Court said "the legislative process is peculiarly adapted to determine", Congress has answered, and the answer is that the present state of law should remain in effect.[5]

2. The Result Is Not Unjust.

Petitioner would have the Court believe that it must ignore this congressional history in order to do justice. The fact is that there are any number of reasons why Congress may not want to establish a right of contribution in non-collision cases. For example, although Petitioner fails to mention it, Respondent is a covering employer under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, and has paid substantial benefits to Benazet pursuant to that Act for these same injuries. It must make these payments *regardless of fault.* Congress may well have felt that this relationship and the reciprocal obligations between employer and employee under the Act

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[4] See n. 3, *supra.*

[5] It is important to emphasize, as mentioned in n. 3, *supra*, that while these bills originally would have applied to both collision and non-collision cases, they were specifically changed in committee to apply only in collision cases. Thus, there has been congressional recognition of the very distinction between collision and non-collision cases that Petitioner wants this Court to abolish in the area of maritime contribution.

should not be upset by additional employer responsibilities to third parties.

Moreover, as the District Court specifically found, the defect on the boxcar that caused Benazet's injuries was "a condition requiring years to develop"; the car had left Petitioner's possession "less than two months prior to the accident", and thus Petitioner "was either the cause or knew or should have known of the existence of the defects in the brackets of the car it placed in commerce and * * * there was no superseding cause of the accident" (Petition p. A-3). Congress may well have concluded that by denying contribution and thus placing full responsibility on the owner of the defective property, it could better ensure the safety of those working on that property. Thus, this case is not even one of "injustice" as between the parties.[6]

The result here is that the injured Benazet will receive full recovery. This case, therefore, is a far cry from *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), where no right of action for wrongful death existed, where the family of the deceased employee was totally without remedy or redress, where the opinion which originally denied the right of action had itself rested on a faulty interpretation of prior law, and where great confusion in the law had resulted.[7]

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[6] In the transportation field, the Court has refused even to correct instances of injustice when it felt that the task was primarily one for Congress rather than for the courts. *E.g.*, *Crane* v. *Cedar Rapids and Iowa City Ry.*, 395 U.S. 164, 167 (1969).

[7] In *Moragne* the Court was also attempting to achieve uniformity in the wrongful death field regardless of where on navigable waters the seaman's death occurred—that is, whether within or outside the three-mile limit—and regardless of whether the seaman was a "Sierscki" or "Jones Act" type. Here, federal maritime law is uniform in non-collision personal injury cases: there is no right of contribution.

3. There Is No Conflict Between Circuits.

Petitioner cites four cases which it says are in conflict with the ruling below and which therefore call for review of that ruling by this Court. The conflict is illusory.

(a) In *Horton & Horton, Inc.* v. *T/S J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), *cert. denied sub nom. Horton & Horton, Inc.* v. *Vaughn Marine, Inc.*, 400 U.S. 993 (1971), the court specifically held *Halcyon* inapplicable. 428 F.2d at 1134. Not only did the case involve a *collision*, but the division of damages was between two vessel owners and brought into play a written assignment of rights and subrogation. In addition, the decision rested on the peculiar relationship of a barge to its tug and a finding that the barge breached a warranty of seaworthiness.

(b) *Watz* v. *Zapata Off-Shore Co.*, 431 F.2d 100 (1970), was decided by the same court and merely relied on *Horton & Horton* in a situation where the vessel was out of navigation and neither of the parties was a vessel (in navigation) owner or the injured party's employer. There was no discussion of the contribution rights, indemnity or liability of the owner of the vessel.

(c) In *D/S Ove Skou* v. *Hebert*, 365 F.2d 341 (1966), decided again by the same circuit, the shipowner was held entitled to 100% indemnity against each of the stevedores, to be borne equally *by them*. There was no discussion of contribution.

(d) The Third Circuit did not even mention *Halcyon* in *Crain Bros., Inc.* v. *Wieman & Ward Co.*, 223 F.2d 256 (1955), and none of the parties cited the case or argued the contribution question in their briefs. The court found that a barge owner breached its warranties

of seaworthiness to a charterer which, in turn, was found to be negligent in the operation of the barges. It is noteworthy that the court cited a *collision* case (*The North Star*, 106 U.S. 17 (1882)) in support of its division of damages and that it modified the lower court judgment to provide that if the cargo owner could not collect one half of the judgment from either party, that amount could then be assessed against the other. Thus, the court was not announcing a rule of contribution as in *Halcyon*, where a vessel owner was denied contribution from the employer of the plaintiff.

Surely, if there were a conflict between circuits, one of the courts in these cases, or in the instant one, would have recognized and mentioned it. None of them has, because no such conflict exists.

4. State Law Does Not and Should Not Control.

As an alternative basis for recovery, Petitioner would have the Court hold that state law controls on the issue of contribution.

In the first place, this is hardly the case to declare any such rule,[8] for as the District Court and the Court of Appeals both pointed out, it is not at all clear that New Jersey law would grant contribution under the circumstances of this case.[9]

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[8] It would also be anomalous to declare a major new rule of maritime law in a case involving two railroads, a defective boxcar and a moored carfloat.

[9] The District Court and Court of Appeals both cited and relied on a 1954 decision of the New Jersey Appellate Division, *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954). It should be noted that that case has been specifically cited with approval by the New Jersey Supreme Court. *Wellenheider* v. *Roder*, 49 N.J. 1, 5, 227 A.2d 329, 333 (1967). For a clear discussion of the reasons why New Jersey law probably would not allow contribution, see Judge Cooper's opinion below, Petition p. A-13 n. 4.

Secondly, even if New Jersey law established a right of contribution, the court would then have to pass on Respondent's contention that it would have a right of indemnity which in turn would "wash out" the contribution.

Thirdly, nothing could be more destructive of federal uniformity in the maritime field than the result sought by Petitioner. In the present case, for example, if the accident had happened on the New York side of the bi-state harbor, New York law would have denied Petitioner any right to contribution because of the absence of a joint judgment. New York Civil Practice Law and Rules, § 1401. An accident happening on different sides of the same navigable waters would thus lead to disparate conclusions on the right of a party to contribution and to great confusion in an area of the law which uniquely calls for harmony and uniformity. Not only do state laws vary widely (see Prosser, *Law of Torts*, 275 *et. seq.* (3d ed. 1964)), but many actions would enmesh the federal courts in disputes as to the location of accidents-in-transit for purposes of determining which state law controlled, and all of the current problems with the application of conflicts of law would be introduced into a large number of suits.

Finally, the most direct answer to Petitioner's request for application of state law is the one given by the Court of Appeals: *Halcyon* did not create a void to be filled by another law, state or otherwise; "it squarely held there is *no right of contribution* among tort feasors in a non-collision case." Petition p. B-6 (emphasis by the court).

CONCLUSION

What the Respondent in *Halcyon* told the Court nineteen years ago—and with which the Court apparently agreed—is even truer now than it was then:

> We suggest that judicial legislation * * * can lead only to chaos. If the scheme of things is to be changed, Congress should legislate. Piece by piece judicial legislation cannot solve the problem satisfactorily.[10]

We respectfully urge the Court to deny certiorari and leave this issue where the Court originally and correctly placed it: with the Congress.

Respectfully submitted,

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[10] Brief for Respondent, *Halcyon Lines & Vinke & Co.* v. *Haenn Ship Ceiling and Refitting Corp.*, Oct. Term 1951 No. 62, p. 17.

APPENDIX

APPENDIX

APPENDIX A

88TH CONGRESS
1ST SESSION

S. 555

IN THE SENATE OF THE UNITED STATES

January 28 (legislative day, January 15), 1963

MR. BARTLETT introduced the following bill; which was read twice and referred to the Committee on Commerce

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A BILL

To unify apportionment of liability in cases of collision between vessels, and in other maritime casualties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, where a collision or other maritime casualty occurs, the compensation due for damages arising therefrom shall be settled in accordance with the following provisions:

SEC. 2. If the casualty occurs without fault, if it is caused by force majeure, or if the causes of the casualty cannot be determined, the damages shall be borne by those who have suffered them.

SEC. 3. If the casualty is caused by the fault of only one vessel, liability to make good the damages shall attach to the one which has committed the fault.

SEC. 4. (a) If the casualty is caused by the fault of two or more vessels, the liability to make good the damages shall be in the same proportion as the degree of fault: *Provided,* That if it is not possible to establish the degree of respective fault, or if it appears that the faults are equal, the liability shall be apportioned equally.

(b) In respect of damages caused by death or personal injury, liability shall be joint as well as several. When a vessel pays a larger part than that which in accordance with the provisions of subsection (a) hereof she ought ultimately to bear, she shall have the right of contribution for the excess.

(c) The damages to vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board shall be borne by the vessels in fault in accordance with the provisions of subsection (a) hereof without joint and several liability toward third parties and without right of contribution.

SEC. 5. The liability imposed by the preceding sections shall attach, in cases where the casualty is caused by the fault of a pilot, even when the carrying of a pilot is compulsory.

SEC. 6. The right of action for the recovery of damages resulting from a casualty shall not be conditional upon the entering of a protest or the fulfillment of any other special formality.

SEC. 7. The provisions of this Act shall not affect the liability under a contract of carriage or any contract; nor shall such provisions be construed as imposing any liability from which there is exemption by any contract or by any provision of law, or as affecting the right to limit liability in the manner provided by law.

SEC. 8. (a) Actions for the recovery of damages shall be barred after an interval of two years from the date of the casualty.

(b) Actions to enforce the right of contribution allowed by subsection (b) of section 4 shall be barred after an interval of one year from the date of payment.

(c) The court in which such actions are brought may extend such interval if it shall be satisfied that during such

period there had not been any reasonable opportunity of arresting the vessel involved within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business.

SEC. 9. This Act shall apply to the liability to make good the damages caused or contributed to by any fault of a vessel even if no collision has actually taken place.

SEC. 10. This Act shall apply to the liability to make good the damages in all cases to which the admiralty and maritime jurisdiction of the United States extends. The liability to make good the damages shall be in the same proportion as the degree of fault respectively committed and shall apply in the same manner between any vessel or vessels and the owners or operators of any land structure, facility, or other property, or between other persons, as the rule is applied between vessels.

SEC. 11. This Act shall apply to actions in personam as well as to actions in rem.

SEC. 12. The last sentence of section 1 of the Act of September 4, 1890 (26 Stat. 425 (33 U.S.C. 367)) is hereby repealed.

SEC. 13. This Act may be cited as the "Collision Liability Apportionment Act, 1963". It shall apply only to causes of action arising after the date of its approval.

Supreme Court, U.S.
FILED
DEC 10 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BENAZET,

Respondents.

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Section 3, New Jersey Joint Tortfeasors Contribution Law, N.J. Rev. Stat. 2A:53A-3 ..... 2, 18, 19, 20, 21

Public Vessels Act, 43 Stat. 1112, 46 U.S.C. §§781-90 7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BENAZET,

Respondents.

BRIEF FOR PETITIONER

Opinions Below

The opinion and order of the District Court (Cooper, U.S.D.J.) (A. 79) are reported at 315 F. Supp. 357. The decision of the Court of Appeals for the Second Circuit affirming the order of the District Court (A. 94) is reported at 442 F.2d 694.

Jurisdiction

The decision of the Court of Appeals affirming the order of the District Court was filed and entered on April 23, 1971. A Petition for Certiorari was filed with this Court on July 22, 1971. Certiorari was granted on October 26, 1971. The jurisdiction of this Court is conferred under 28 U.S.C. §1254(1).

Statutes Involved

New Jersey Joint Tortfeasors Contribution Law, §3 (N.J. Rev. Stat. 2A:53A-3) which provides:

> "Judgment against joint tortfeasor; contribution. Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought." L.1952, c.335, p. 1075, §3.

The Longshoremen's and Harbor Workers' Compensation Act, §5 (33 U.S.C. §905) which provides:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not

plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. March 4, 1927, c.509, §5, 44 Stat. 1426."

Questions Presented

1. Should this Court recognize a right to contribution under maritime common law in non-collision cases?

2. Is contribution precluded by the Longshoremen's and Harbor Workers' Act?

3. Should the court of appeals have applied a New Jersey statute creating a right of contribution?

Statement of the Case

Jurisdiction in the district court rested on diversity of citizenship of the parties.

The action was commenced on May 5, 1966 by Benazet, a resident of New Jersey, against Atlantic, for injuries sustained by him on July 30, 1964 when he fell while working on a box car owned by Atlantic, but in the custody of Erie. Benazet was employed by Erie as a yard brakeman. The box car was on Erie's car float, floating on the Hudson River. Benazet fell in the process of tightening the handbrake because both the footboard on which he was standing and the brake-wheel supports broke. The evidence showed that the footboard was decayed and that the brake-wheel supports had been damaged and improperly repaired somewhere in the course of the car's passage

through many railroad systems. The evidence further showed that the defects should have been readily apparent and that the damage to the footboard in particular was easily observable from the ground (A. 34-37). Erie failed to discover the defects although it had a duty to inspect the car on receipt in interchange from a connecting line.

Atlantic impleaded Erie on the ground that Erie was negligent and liable to Atlantic for contribution or indemnity. Erie answered and participated as a third party defendant in the trial.

The jury found that Atlantic was negligent. It also found that Erie was negligent and that Erie's negligence was a substantial factor in bringing about Benazet's injuries. The jury awarded a verdict of $200,000 to Benazet (A. 61-62).

Erie moved for a post-trial order dismissing Atlantic's third party complaint as a matter of law on the ground that no right of contribution existed under maritime law or through supplementation of maritime law with state law.

The opinion and order of Cooper, J. filed July 2, 1970 (315 F. Supp. 357) dismissed Atlantic's third party claim against Erie for contribution as a matter of law (A. 79). This order was affirmed by the Second Circuit Court of Appeals (Smith and Moore, C.J.J. and Timbers, D.J.) in an order and judgment filed April 23, 1971 (A. 94).

Summary of Argument

Deciding now the questions deferred in *Halcyon* v. *Haenn*, this Court should recognize that two parties jointly liable in tort for the injuries to an employee covered by the Longshoremen's and Harbor Workers' Act should both contribute to the judgment in his favor, and that the Act is not a bar to such contribution. *Halcyon's* invitation to congressional action has not been accepted, although two decades have passed. Cases decided in the meantime have held either party liable under theories of contract, despite the Harbor Workers' Act, and have required equal contribution in tort cases where the Harbor Workers' Act was not present. No reason persists, or is required to make the Harbor Workers' Act effective, to justify the unfair result of one party bearing sole responsibility for damages created by both.

Alternatively, a right of contribution provided by a New Jersey statute should be applied to this accident in New Jersey waters.

ARGUMENT

1. *Court of Appeals' application of* Halcyon

The Court of Appeals stated that "Atlantic's contribution claim, so far as the equities are concerned, is appealing" (A. 98). But it felt precluded from awarding contribution by this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); it quoted Judge Friendly's admonishment[1] that—

> "So long as *Halcyon* v. *Haenn* . . . remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court . . . ."

The *Halcyon* case presented questions of the existence and extent[2] of a duty of contribution among joint tortfeasors whose negligence had injured a harbor worker employed by one of them to repair a ship owned by the other. Although lower courts had awarded contribution in admiralty cases[3] as this Court had recognized,[4] and although contribution had been found proper by Mr. Justice

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[1] In *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 395 U.S. 946 (1969).

[2] Whether the employer should contribute 75% (its proportion of fault as found by the jury), or 50% (the "general rule governing maritime torts"), or no more than its employee could have obtained from it by compensation under the Longshoremen's and Harbor Workers' Compensation Act, or nothing (342 U.S. at 283-4; fn. 12 at 286-7).

[3] See *e.g.*, *The S.S. Samovar*, 72 F. Supp. 574 (N.D. Calif. 1947); *The Tampico*, 45 F. Supp. 174 (W.D. N.Y. 1942); and *New York & Porto Rico S.S. Co.* v. *Lee's Lighters, Inc.*, 48 F.2d 372 (E.D. N.Y. 1930).

[4] In *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947) (dictum).

Holmes thirty years before,[5] the *Halcyon* Court stated that the maritime doctrine of equal contribution had never been expressly applied by the Supreme Court to non-collision cases (342 U.S. at 284). The Court stated that it "would feel free to do so here if wholly convinced that it would best serve the ends of justice" but concluded it was wiser to let the rules of contribution await congressional action. Congress had enacted the Limited Liability Act,[6] the Harter Act,[7] the Jones Act,[8] the Public Vessels Act,[9] and the Longshoremen's and Harbor Workers' Compensation Act;[10] its processes were peculiarly adapted to determine whether any right of contribution should be limited by the Harbor Workers' Act, or based on equal sharing of damages, or apportioned according to fault; and because Congress while acting in the field had not approved "the rule of contribution here urged" it was inappropriate for the Court to do so (342 U.S. at 285-7).

In the two decades since the *Halcyon* decision, Congress has not acted. To the extent *Halcyon's ratio decidendi* was based on anticipated legislative clarification, that reason has failed. The concern whether the sole exposure to liability of a harbor worker's employer should be the Harbor Workers' Act has been substantially eliminated by: a

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[5] *White Oak Transp. Co.* v. *Boston, Cape Cod and New York Canal Co.*, 258 U.S. 341 (1922) (not involving Longshoremen's and Harbor Workers' Compensation Act).

[6] R.S. §4281, *as amended*, 46 U.S.C. §181 *et seq.*

[7] 27 Stat. 445, 46 U.S.C. §§190-195.

[8] 41 Stat. 1007, 46 U.S.C. §688.

[9] 43 Stat. 1112, 46 U.S.C. §§781-790.

[10] 44 Stat. 1424, 33 U.S.C. §901 *et seq.*

series of cases following *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*,[11] imposing obligations based upon contractual concepts; this Court's decision in *Jackson* v. *Lykes Bros. S.S. Co.*[12] that longshoremen can (notwithstanding the Harbor Workers' Act) sue their employer for unseaworthiness if he is also the shipowner; this Court's adverse construction in *Weyerhaeuser S.S. Co.* v. *U. S.*[13] of similar protective words in the Federal Employees' Compensation Act;[14] this Court's observation in *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co.*[15] that there is no *quid pro quo* blocking liability to third persons; and advances in the direction of fairer rights to contribution and the equal sharing of damages, made by other federal courts. During the same period the *Halcyon* decision has come under steady criticism by both courts[16] and commentators.[17]

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[11] 350 U.S. 124 (1956).

[12] 386 U.S. 731 (1967).

[13] 372 U.S. 597 (1963).

[14] 63 Stat. 861 (1949), *as amended*, 5 U.S.C. §8116(c) (1966).

[15] 394 U.S. 404 (1968).

[16] See, *e.g.*, *Bilkay Holding Corp.* v. *Consol. Iron & Metal Co.*, 66 Ad. 344 (S.D.N.Y., filed Aug. 17, 1971), which refers to the instant case as "the most recent expression of post-*Halcyon* consternation in this Second Circuit."

[17] See Gilmore & Black, *The Law of Admiralty* 367 (1957); Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 519 (tentative ed. 1958); Albritton, Division of Damages in Admiralty—A Rising Tide of Confusion, 2 J. Mar. L. & Com. 323 (1971); Proudfoot, "The Tar Baby": Maritime Personal Injury Indemnity Actions, 20 Stan. L. Rev. 423, 425-26 and 445 (1968); Currie, Federalism and the Admiralty, "The Devil's Own Mess", The Supreme Court Rev. 158, 212-13 and 220-21 (1960); Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers, 39 Cornell L. Rev. 381 at 421-22 and 424 (1954).

Generally understood as prohibiting contribution except where it is clear the employer is not by statute immune from tort liability, *Halcyon* works manifest injustice.

In the present case although the jury found that Erie's negligence was a substantial factor in bringing about Benazet's injuries, the court of appeals' opinion denies Atlantic any contribution from Erie towards the $200,000 judgment. Erie will recoup—from the judgment paid to Benazet by Atlantic—its compensation payments, and will end by paying nothing. Although negligent and responsible, Erie thus pays even less than it would have been required to do if plaintiff had proceeded only under the Harbor Workers' Act—a strikingly anomalous and unfair result.

Although for different reasons, equally subject to the charge of unfairness are the results of the *Ryan* line of cases referred to above; in each, one party must bear alone the impact of damages to which another party's actions contributed. After twenty years, this Court's deference to Congress should no longer impede its correction of the situation. This Court should now decide the question which it put aside in *Halcyon* and establish a right of contribution so that consistency and rationality may prevail in maritime personal injury actions, distributing the loss among those responsible rather than arbitrarily imposing the entire loss on one party.

We deal below with advances made since *Halcyon*, pointing towards solutions of the problems it presented.

A. *The problems facing the* Halcyon *Court: (i) whether to grant contribution, and (ii) if so, how much?*

(i) Contribution in maritime torts was the accepted practice, not only in collision cases but also in non-collision cases where particular statutory difficulties were not involved, *e.g., White Oak Transp. Co.* v. *Boston, Cape Cod and New York Canal Co.*, 258 U.S. 341 (1922). It is particularly appropriate as a characteristic of admiralty law, which recognizes the equity of the comparative-negligence rule as between plaintiffs and defendants. See Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L. Rev. 304 (1957). In a fatal accident following (but unrelated to) a collision, the Fifth Circuit allowed contribution and restricted *Halcyon* to cases where the tortfeasor from whom contribution was sought had statutory tort immunization. *Horton & Horton, Inc.* v. *T/S J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), *cert. denied sub nom. Horton & Horton, Inc.* v. *Vaughan Marine, Inc.*, 400 U.S. 993 (1971); followed in *Watz* v. *Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970). The Second Circuit concurs. *In re Seaboard Shipping Corp. and Moran Inland Waterways Corp.*, N.Y.L.J. Oct. 8, 1971, p. 1 (2d Cir. Sept. 29, 1971). Two decisions of this Court show that Erie is not protected by the Harbor Workers' Act from its liability as a shipowner to plaintiff who was injured on its vessel. *Reed* v. *The Yaka*, 373 U.S. 410 (1963); *Jackson* v. *Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967). No reason remains why it should not contribute to the loss resulting from its substantial negligence.

(ii) Halcyon's brief in this Court (p. 10) in 1951 described three separate views in four circuits regarding the extent of liability for contribution in such cases. This

Court's decision, of course, left that question open. Since *Halcyon*, every court allowing contribution has divided the damages equally. *Horton & Horton, supra; Watz* v. *Zapata, supra; Seaboard, supra.* That was the general admiralty rule. *White Oak Transp. Co., supra; American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947). Adopting this practice would harmonize the present dichotomy between collision and non-collision cases in admiralty. It was the preference of the two dissenting Justices in *Halcyon* (342 U.S. at 287). It offers simplicity upon the trial of these third-party actions: although a comparative negligence standard may be applied as between plaintiff and the parties defendant, if there is evidence of substantial negligence on the part of each defendant the trial need not be complicated by assessing refined degrees of their fault. The damages will be borne equally by the two parties having a commercial interest in the work during which plaintiff was injured.

These indicated answers to the *Halcyon* questions being sufficiently clear, this Court should now recognize the justice of contribution in cases such as this. Such recognition would be consonant with the developing trends in the law since *Halcyon.*

2. *The* Ryan *line of cases*

Shortly after *Halcyon,* this Court found an implied warranty of workmanlike performance running from the stevedore to the shipowner, which shifted to the stevedore the impact of the uncompensated loss. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). There, the Court decided that (1) the Longshoremen's Act does not preclude assertion by a shipowner of a stevedoring

employer's liability to it, and (2) even absent an express agreement of indemnity, the stevedore's implied warranty of workmanlike service obliged it to indemnify a shipowner for damages caused by the stevedore's improper storage of cargo. In some respects, the cure was as disastrous as the disease. The responsibility for compensating the injured employee again fell entirely on the shoulders of one of the parties causing the injury—here, the one who went scot free in *Halcyon*. The decision of the Court in *Ryan* was recognized by Mr. Justice Black in his dissent as undercutting *Halcyon*. He said at 350 U.S. 124, 146:

> "There has been considerable disagreement in this Court and among other courts about three of our recent holdings, *Seas Shipping Company* v. *Sieracki*, 328 U.S. 85; *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282; and *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406. In each of these cases a worker in the same position as Palazzolo sued a shipowner alleging negligence and unseaworthiness. Judgments were obtained against the shipowners. We held in the *Halcyon* case that the shipowner could not under the common-law doctrine of 'contribution' force injured employees' employers to pay part of the judgment against the shipowner . . . The Court's opinion today provides a way under which by simple change of words and remedial formulas results reached in our three former cases can be undermined."

Under various applications, the concept of a contractual obligation to indemnify, arising out of the commercial relationship, has been enlarged and loosened. See *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958) (extended to use of equipment incidental to cargo-handling); *Crumady* v. *The Joachim Hendrik Fisser*, 358

U.S. 423 (1959) (extended to negligence which merely brought latent condition of unseaworthiness into play; and although stevedoring contract was with charterer rather than shipowner); *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960) (shipowner received benefit of implied warranty, although stevedoring contract was with consignee of cargo); and *Italia Societa per Azioni de Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964) (shipowner had indemnity even though stevedore was not negligent; equipment stevedore supplied was defective).

A compensating duty by the shipowner to the stevedore was found in *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1968), which discussed various other theories of liability and cross-obligations running between stevedoring contractors and shipowners. Their rights of suit *inter se* in tort and contract (other than for contribution) were left open "to place the liability where it justly belongs", 394 U.S. at 420, but without provision for the case where the liability should justly be shared. The application of an indemnity in favor of the shipowner shifted the burden once again, but it still was borne by one party only.

3. *Contribution in joint tort cases*

Contribution in non-collision cases has been allowed in three decisions during the past two years, two in the Fifth Circuit and one in the Second Circuit.[18] Each of these held that the decision in *Halcyon* that there is no right to

[18] *Horton & Horton, Inc. v. T/S J. E. Dyer*, 428 F.2d 1131 (1970); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970); *In re Seaboard Shipping Corp. and Moran Inland Waterways Corp.*, N.Y.L.J. Oct. 8, 1971, p. 1 (2d Cir.) Sept. 29, 1971.

contribution in non-collision cases applies only where the employer's liability to his employee is by statute limited to the compensation payments thereunder.

In *Horton* the court said at page 1134:

> "Regardless of whether we consider the restrictive language of *Halcyon* as dictum or determine that it should be confined to its own particular facts, that is, as barring division of damages among joint tortfeasors, one of which is statutorily immune from tort liability, we agree with the District Court that the *Halcyon* doctrine is not applicable here. . . ."

In *Watz*, the court said at page 120:

> ". . . we have a case of joint tortfeasors. This Court has already held that the apparent prohibition of Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation, 1952, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318, against contribution between joint tortfeasors in admiralty does not apply to a situation where Watz as plaintiff could have proceeded against both Eaton and Campbell and could have recovered damages from both. Horton & Horton, Inc. v. T/S J. E. Dyer, 5 Cir. 1970, 428 F.2d 1131 [No. 28,706]. *Halcyon* is distinguished by the fact that there a statute precluded recovery by the plaintiff against the impleaded party."

In *Seaboard* the court said:

> "Here, as in Horton, had Seaboard and Moran not settled with the personal representatives of Captain Naess and Mr. Thompson, both would have been responsible in damages, unlike the situation in Halcyon, where the injured employee was restricted by the limited tort liability provisions of the Harbor Workers' Act and thus precluded from suing his employer once he had gone against the shipowner (Cf. Luigi Serra, Inc. v. S.S. Francesco C, 379 F.2d 540, 2 Cir.,

1967). We believe Halcyon to be inapplicable in cases where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute."

In this case, the joint tortfeasor against whom contribution is sought, Erie Railroad, as the shipowner is not immune from tort liability by reason of the Longshoremen's Act, on the authority of *Reed* v. *The Yaka,* 373 U.S. 410 (1963) and *Jackson* v. *Lykes Bros. S.S. Co.,* 386 U.S. 731 (1967).

In *Yaka* petitioner, a longshoreman, filed a libel *in rem* against a ship for injuries sustained while engaged in loading it as an employee of the corporation which was operating it under a bareboat charter. The corporation contended that it could not be held liable in damages to petitioner for unseaworthiness, because it was petitioner's employer, and the Longshoremen's and Harbor Workers' Compensation Act provides that the compensation liability of an employer under that Act is exclusive and in place of any other liability on his part. Mr. Justice Black, on behalf of the Court, held that the petitioner was not barred by that Act from relying on the corporation's liability as a shipowner for the ship's unseaworthiness in order to support his libel *in rem* against the ship.

In *Jackson* v. *Lykes Bros. S.S. Co.* a longshoreman, employed on Lykes' ship in navigable waters, died from inhalation of noxious gases. His widow claimed that death was caused by Lykes' negligence in operating the ship or by the ship's unseaworthiness. Speaking for the Court, Mr. Justice Black held that a longshoreman employed on a ship, whether by an independent stevedoring company or by the shipowner, is not limited to his recovery under the Longshoremen's and Harbor Workers' Compensation Act but can recover *in personam* from the

owner-employer for the unseaworthiness of the ship, citing *Yaka*. The Court stated that any other result would be "incongruous, absurd and unjust" (386 U.S. at 735).

4. *Construction of the Harbor Workers' Act*

Nothing in the actual wording of the Harbor Workers' Act prohibits the contribution sought here. Section 5, 44 Stat. 1426, as set forth in 33 U.S.C. §905, reads as follows:

> "The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ."

In *Weyerhaeuser S.S. Co.* v. *U. S.*, 372 U.S. 597 (1963) construing the "sister" Federal Employees' Compensation Act, 63 Stat. 861 (1949), *as amended*, 5 U.S.C. §8116(c) (1966), this Court cited the rule against giving to general words a meaning unrelated to the specific terms of the statute. Section 7(b) of that Act provided that the liability of the United States under the Act for

> "injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States. . . ."

It decided that the remedy under that Act was limited to employees, their representatives and dependents, but found no "evidence whatsoever that Congress was concerned with the rights of unrelated third parties." *Id.* at 601. Similar meaning should be given to the similar language in the

Harbor Workers' Act. As this Court noted in *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co.*:

> "[T]he exclusivity of the statutory compensation remedy against the employer was designed to counterbalance the imposition of absolute liability; there is no comparable *quid pro quo* in the relationship between the employer and third persons". 394 U.S. 404 at 413 (1968).

5. *Stare decisis*

In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court overruled one of its prior decisions, *The Harrisburg*, 119 U.S. 199 (1886) which had held that maritime law did not afford a cause of action for wrongful death. Considerations which led the Court to reach its decision are present in this case:

(a) There is no public policy against permitting contribution in this case. Quite the opposite. Not to permit contribution will work injustice.

(b) American jurisdictions which hold that no contribution is available under common law cite *Merryweather* v. *Nixan*, 8 T.R. 186, 101 Eng. Rep. R. 1337 (1799) as their authority. *Merryweather* involved a wilful joint wrong, and later English decisions allowed contribution among non-intentional wrongdoers. *Adamson* v. *Jarvis*, 4 Bing. 66, 130 Eng. Rep. R. 693 (1827); *Betts* v. *Gibbons*, 2 Ad. & E. 57, 111 Eng. Rep. R. 22 (1834). See Prosser, *Torts* 274-75 (3d ed. 1964).

In *Moragne*, the Court said at page 403:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish

> a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

As in *Moragne*, the first factor, the mainstay of *stare decisis* is absent. A decision permitting contribution will not threaten the confidence of people in their ability to predict the legal consequence of their actions. A division of damages between the parties at fault will assure more rather than less care. Like *The Harrisburg*, the *Halcyon* rule has failed to prove its acceptability and has been frequently either avoided or narrowly restricted. As the Court said in *Moragne* at page 405:

> "Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today."

6. *The New Jersey Joint Tortfeasors Act*

Should this Court decide that it has no right to contribution under maritime law, Atlantic in the alternative submits that a New Jersey Joint Tortfeasors Contribution Law, N.J. Rev. Stat. Chap. 2A:53A (1952) ("the Joint Tortfeasors Act"), should be applied.

Where no recognized maritime rule exists, this Court has often applied a state statute or rule rather than shape

a maritime rule on such a question. See, *e.g.*, *Hess* v. *U. S.*, 361 U.S. 314 (1960) (state employers' liability act), *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) (state rule on breach of warranty in insurance contract), *Standard Dredging Corp.* v. *Murphy*, 319 U.S. 306 (1943) (state unemployment compensation law), *Just* v. *Chambers*, 312 U.S. 383 (1941) (state survival statute), *Western Fuel Co.* v. *Garcia*, 257 U.S. 233 (1921) (state wrongful death statute).

Contrary to the court of appeals' opinion, *Halcyon* did not prevent it from applying the Joint Tortfeasors Act to allow contribution between Atlantic and Erie. Nothing in the briefs of the parties or this Court's opinion in *Halcyon* indicates that any consideration was given to the application of a state-created remedy.

State wrongful death statutes were long applied in maritime cases despite the far clearer ruling in *The Harrisburg*, 119 U.S. 199 (1886) that no such action existed under maritime law. If *The Harrisburg* did not bar the application of state statutes, then *Halcyon* should not be said to do so. Indeed, this Court cited *Halcyon* in support of its refusal to shape a maritime rule concerning the breach of an unrelated warranty in a maritime insurance policy, yet allowed the application of a state rule instead. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

In *Just* v. *Chambers*, 312 U.S. 383 (1941), respondents contended that the use of state wrongful death acts to supplement maritime law was justified because maritime law left the matter "untouched", whereas there was a "positive" maritime rule against the application of a state survival statute. This Court termed the argument

> "... a subtlety which we think does not merit judicial adoption ... [T]he pith of the matter is that the

maritime law, as we conceived it, did not permit recovery, and in the same sense, in substance, the maritime law denied the survival of causes of action against a deceased tortfeasor. The maritime law would be supplemented or modified by state legislation in the one case as truly as in the other, and either supplement or modification is permissible in accordance with the accepted criterion." *Id.* at 391-92.

This Court has likened the process of deciding whether a state rule can be applied in a maritime case to the balancing attempted in "the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern." *Kossick* v. *United Fruit Co.*, 365 U.S. 731 at 739 (1961).

The use of such a "balancing test" here would compel the application of the Joint Tortfeasors Act. No federally created right would be abridged, *Wilburn Boat Co.* v. *Fireman's Ins. Co.*, 348 U.S. 310 (1955), because the application of the Joint Tortfeasors Act cannot be used to prevent a plaintiff from making a full recovery. *Tino* v. *Stout*, 49 N.J. 289, 229 A.2d 793 (1967). Maritime commerce would not be impeded in any way because the application of state-created contribution rights does not change any maritime duty of care.

New Jersey has a strong interest in applying the Joint Tortfeasors Act in the instant case. The tort took place in New Jersey territorial waters, Benazet was a resident of and worked in New Jersey, and New Jersey might well have thought it improper for Erie to escape all liability for its own negligence in failing to inspect the box car properly. As "one of the most effectual of all sanctions, . . . a liability to pay a pecuniary indemnity", *The City of Norwalk*, 55 Fed. 98, 108 (S.D.N.Y. 1893), the allowance of contribution would thus further New Jersey's interest in

protecting the safety of its residents. As the record shows, Atlantic's box car was in almost continuous transit over the lines of other railroads prior to Benazet's injury (A. 26-27). This is the norm for most railroad equipment, and it is easy to see why it is imperative to impose a high duty of care on a railroad such as Erie to inspect such rolling stock received in interchange. This is the only way in which such readily observable conditions as the rotten footboard in the instant case which develop during transit can be remedied quickly enough to avert the danger to railway men such as Benazet.

While the court of appeals indicated in *dicta* that a decision of the Appellate Division of the Superior Court of New Jersey, *Farren* v. *N. J. Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954), might prevent the application of the Joint Tortfeasors Act in the instant case, it apparently did not appreciate that the basis for the *Farren* decision was that the party from which contribution was sought was not liable to the injured person in tort. Here, Erie as the shipowner was liable to Benazet in tort as well as under the Longshoremen's Act. Furthermore, it is doubtful that *Farren* would apply in a situation such as the instant one where Erie has breached a duty of inspection owed to Atlantic under the Interchange Rules of the Association of American Railroads. See *Hagen* v. *Koerner*, 64 N.J. Super. 580, 166 A.2d 784 (App. Div. 1960); and also see *Frueh* v. *Kupper*, 54 N.J. Super. 296, 303, 148 A.2d 743, 747 (1959) (applying the state Joint Tortfeasors Act to a maritime accident): "... the basic purpose of the statute is to achieve a sharing of the common responsibility according to equity and natural justice."

CONCLUSION

The decision of the Court of Appeals refusing to award contribution should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner*,

v.

ERIE LACKAWANNA RAILWAY COMPANY and THEODORE BENAZET, *Respondents*.

BRIEF FOR RESPONDENT ERIE LACKAWANNA RAILWAY COMPANY

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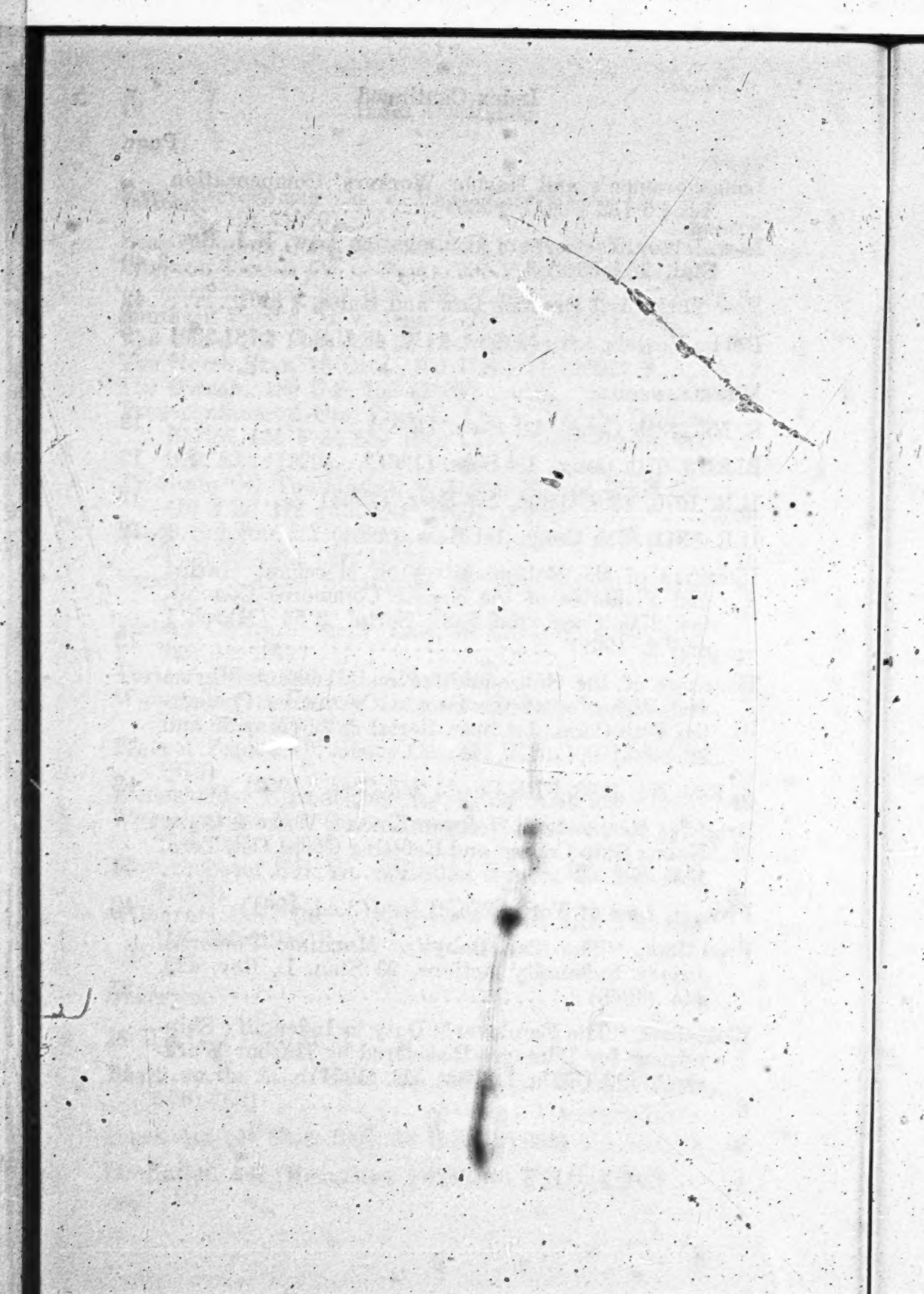

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner*,

v.

ERIE LACKAWANNA RAILWAY COMPANY and THEODORE BENAZET, *Respondents*.

BRIEF FOR RESPONDENT ERIE LACKAWANNA RAILWAY COMPANY

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Cooper, J.) is reported at 315 F. Supp. 357 and is printed at A-79. The unanimous opinion and judgment of the United States Court of Appeals for the Second Circuit affirming the District Court order is reported at 442 F.2d 694 and is printed at A. 94, 102.

JURISDICTION

The decision of the Court of Appeals affirming the order of the District Court was entered on April 23, 1971. A Petition for a Writ of Certiorari was filed with this Court on July 22, 1971. Certiorari was granted on October 26, 1971. The jurisdiction of this Court is conferred under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under the factual circumstances of this case, *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), should be overruled, thereby disrupting an efficient and familiar system of allocating losses in maritime personal injury cases which has the evident approval of Congress.

2. Whether Petitioner should be permitted contribution from Respondent despite the holding in *Halcyon*, established rules of contribution, current principles of admiralty law, and the provisions of duly enacted federal legislation.

3. Whether state rather than federal law governs as to the rule of contribution in maritime non-collision cases.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, § 5 (33 U.S.C. § 905), provides:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury

> or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

STATEMENT

Theodore Benazet,[1] an employee of Respondent Erie Lackawanna Railway ("Erie"), was injured on July 30, 1964, when he fell to the deck of a carfloat while working on a boxcar owned by Petitioner Atlantic Coast Line Railroad Company ("Atlantic"). A-8, 43. At the time of the accident, Benazet, a yard brakeman, was attempting to tighten a handbrake on Atlantic's boxcar, which was standing on Erie's carfloat moored in New York harbor off the New Jersey shore. A-22, 43.

Benazet brought suit against Atlantic in state court. A-7. The action was removed to federal court on diversity of citizenship (A-4), and Atlantic impleaded

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[1] This Brief is filed on behalf of Respondent Erie Lackawanna Railway Company only. Theodore Benazet was interested in the proceedings in the Court of Appeals, since issues such as contributory negligence and the size of the jury verdict were raised, but those issues are not involved here. We presume, therefore, that Benazet has no interest in the outcome of Atlantic's petition in this Court. Atlantic, however, has not filed a Rule 21(4) notification of its belief that Benazet has no interest in the outcome herein.

Erie on the ground that Erie was negligent for failure to inspect properly and that Atlantic was entitled to contribution. A-12. (Atlantic also claimed originally a right to indemnity but dropped this claim at the end of the trial. A-85 n. 2.)

As District Judge Cooper noted in his opinion (A-79-80), the facts evidently found by the jury were that when Benazet applied the handbrake, a rotted footboard gave way, and he put his weight against the handbrake assembly which in turn broke away from the car as a result of some defective brackets. The defective condition of the brackets required "years to develop," and a repair job had been attempted in "a highly improper procedure". A-80-81; and see A-40-41. The evidence failed to show who had performed this repair job. One expert testified that the rotting and deterioration of the wooden footboard took "at least two years" to develop. A-30.

During the two years prior to the accident, this particular boxcar had been in the possession of 49 different railroads. Pl. Ex. 4; CA App. 367b. It had been in the possession of one railroad nine times, Atlantic eight times, one railroad six times, one railroad five times, four railroads—including Erie—four times each, five railroads three times each, eight railroads twice each, and 28 railroads once each. The boxcar had left Atlantic's possession less than two months prior to the accident, had then been in the possession of nine different railroads, and had been in Erie's possession for only three days. A-26-27, 81; CA App. 367b.

Federal law requires the owning railroad to examine safety appliances, including the braking system, when such a railroad receives its cars back onto its line. The

defect in the welding on Atlantic's car as well as the rotten floorboard were visible and should have been perceived through a proper inspection when Atlantic received the car on June 1, 1964. A-35, 41-42.

Late in the trial, the District Court realized that maritime law might govern this case, since Benazet's injury occurred on a carfloat located on navigable waters. See A-52. Although the District Court recognized that maritime law would not permit contribution between Erie and Atlantic (A-54), it nevertheless instructed the jury as follows, attempting to avoid any unnecessary retrial in the event it was determined that maritime law did not apply:

> Now, the law provides that where an injury is suffered by any person as a result of negligence of joint tortfeasors and the person suffering an injury recovers a money judgment for such injury against one of the joint tortfeasors, that defendant shall be entitled to recover contribution from the other tortfeasor, the other person who played a part in the production of the negligence. [A-59.]

So instructed, the jury found that both Atlantic and Erie were negligent, and that Erie's negligence was "a substantial factor" in bringing about Benazet's injuries. A-61-62. The jury was not asked and did not find whether Atlantic's negligence was "a substantial factor" in bringing about Benazet's injuries, nor was any percentage of negligence assigned to either Atlantic or Erie.[2] However, as the District Court specifi-

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[2] Erie's counsel moved subsequent to trial, *inter alia*, for a dismissal of the complaint as to Erie on the ground that "contribution is not allowed under maritime law in cases such as this," and "even if New Jersey law were applied, there would be no con-

cally found, "*** Atlantic was either the cause or knew or should have known of the existence of the defects in the brackets of the car it placed in commerce and *** there was no superceding cause of the accident." A-81. Erie's negligence consisted solely of its failure to discover the defects through inspection. A-59-61.

The District Court upheld the jury's award of $200,000 as against Atlantic and dismissed Atlantic's claim for contribution against Erie. A-79. The Court of Appeals unanimously affirmed. A-94.

ARGUMENT

1. The problem of contribution in non-collision cases is peculiarly one for Congress.

We do not in any way question the *power* of this Court to fashion new rules governing maritime cases. We do question, however, the wisdom of exercising that power in this case to establish a new rule of contribution in non-collision, maritime personal injury cases, particularly in the light of Congress' refusal to change the rule long since established by this Court that no such contribution exists.

Almost twenty years ago this Court was asked to hold that there was an established right to contribution between tortfeasors in the types of cases just described. It refused to do so. *Halcyon Lines* v. *Haenn Ship*

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tribution where the incident falls within the Longshoremen's and Harbor Workers' Compensation Act". In the alternative, he moved for judgment in favor of Erie on the ground that Atlantic "was the primary party causing negligence to the degree it would have been found liable in indemnity to" Erie. A-64-65. Ruling that contribution was not permitted, the District Court did not have to reach the latter contention.

Ceiling & Refitting Corp., supra.[3] The Court said that whether such a right should exist must "await congressional action," since Congress had theretofore "stopped short of approving the rule of contribution here urged ***." 342 U.S. at 285, 287.

Significantly, the Court pointed out:

> Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration

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[3] Atlantic continues in its Brief to portray *Halcyon* as deferring (Ptr's Brief, p. 5) or putting aside (*id.* at 9) the issue of contribution in non-collision cases. The Court of Appeals correctly pointed out that *Halcyon* "expressly held" no such right of contribution to exist. A-98-99; and see the District Court's ruling at A-90-91. An admiralty rule of law can be stated positively or negatively, of course, and it is nonetheless a rule of law. *Just* v. *Chambers*, 312 U.S. 383, 391 (1941). Moreover, this Court itself has refuted Atlantic's characterizations. In *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 320 (1964), the Court said that *Halcyon* "held that maritime principles of contribution between joint tortfeasors prevailing in collision cases were not applicable in suits for contribution by a shipowner against stevedoring companies." In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 408 (1953), the Court stated that in *Halcyon*, "we held that contribution could not be exacted under circumstances like those here involved." And in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404, 417-418 (1969), the Court described *Halcyon* as a decision "that we would not 'fashion new judicial rules of contribution' between the shipowner and the stevedoring contractor as joint tortfeasors."

Moreover, the common law refused to permit contribution between joint tortfeasors. See *Simpson Timber Co.* v. *Parks*, 390 F.2d 353, 356 (9th Cir.), *cert. denied*, 393 U.S. 858 (1968). Admiralty had permitted contribution in collision cases, *e.g.*, The *North Star*, 16 Otto (106 U.S.) 17 (1882), but not expressly in non-collision cases. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp., supra*, 342 US. at 284.

> and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most benefical in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. [*Id.* at 286.]

The Court went on to say:

> Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties. [*Id.* at 286-287; footnote deleted.]

Both in these and other portions of its opinion, the Court thus made two important points. First, Congress might or might not want to change the rule that no right of contribution exists, depending upon legislative investigation and what advocates and opponents of such a rule were able to show. Secondly, the solution was peculiarly one for Congress in view of the fact that application of the rule could be limited by other maritime acts, and even if the rule were changed and applied, further decisions would have to be made, such as how contribution was to be apportioned and in what ways the new rule would be "integrated with other

acts" in the maritime field.[4] This point was reinforced just this Term when the Court, in another maritime case, *Victory Carriers, Inc.* v. *Law*,[5] refused, "in the absence of explicit congressional authorization," to affirm a Court of Appeals decision which would "raise a host of new problems."

Halcyon has not stood alone, unreviewed over the ensuing years. In *Pope & Talbot, Inc.* v. *Hawn, supra,* for example, not only did the Court specifically reaffirm *Halcyon* but it even refused to reduce the shipowner's liability by the amount the longshoreman had received from his employer as compensation, although the longshoreman had agreed to refund these payments out of his recovery from the shipowner, because to allow such a reduction "would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case." 346 U.S. at 412. And as recently as 1969, the Court was careful in a unanimous opinion by Mr. Justice Stewart to demonstrate why its ruling was "in no wise a departure from our decision in *Halcyon* ***." *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., supra,* 394 U.S. at 417-418.[6]

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[4] These acts include not only the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U.S.C. § 901 *et seq.*) (hereinafter "Longshoremen's Act"), which, as we show later, is directly involved in the decision here, but also the Jones Act (41 Stat. 1007; 46 U.S.C. § 688), the Public Vessels Act (43 Stat. 1112, 46 U.S.C. §§ 781-790), the Death on the High Seas Act (41 Stat. 537, 46 U.S.C. §§ 761-768), the Limitation Act (Rev. Stat. § 4283, 46 U.S.C. § 183), and a number of other statutes relating to maritime accidents.

[5] 40 U.S.L.W. 4059, 4063 (U.S. Dec. 14, 1971).

[6] See also *Madruga* v. *Superior Court,* 346 U.S. 556, 563 (1954); *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.,* 348 U.S. 310, 320 (1955); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Co.,* 350 U.S.

The extent to which the *Halcyon* doctrine has become embedded in admiralty law is also illustrated by a very recent case, *In re Standard Oil Co.*, 325 F. Supp. 388 (N.D. Cal. 1971). Standard Oil sought contribution from the United States following its liability for wrongful deaths resulting from a fire involving a Standard Oil tug and barge and a Coast Guard patrol boat. The District Court found the liability of the United States and Standard Oil to be "based upon equal mutual fault of both parties," *id.* at 389, but denied contribution, in reliance on *Halcyon*, citing also *Pope & Talbot, Inc.* v. *Hawn, supra,* and *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., supra.* Noting that *Halcyon* had been consistently adhered to in the Ninth Circuit,[7] the court observed: "Based upon subsequent Supreme Court decisions, it has become a well-recognized rule of maritime law." *Id.* at 390.

The *Halcyon* doctrine has been honored time and again,[8] even by its detractors.[9] As we point out below,

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124, 133 (1956); *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625, 630 n.5 (1959); *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597, 603 (1963); *Italia Societa* v. *Oregon Stevedoring Co., supra,* 376 U.S. at 320-322.

[7] *E.g., Union Sulphur & Oil Corp.* v. *W. J. Jones & Son,* 195 F.2d 93 (9th Cir. 1952); *Amerocean S.S. Co.* v. *Copp,* 245 F.2d 291 (9th Cir. 1957); *Mickle* v. *The Henriette Wilhelmine Schulte,* 188 F.Supp. 77 (N.D. Cal. 1960).

[8] *E.g., Transcontinental Gas Pipe L. Co.* v. *Mobile Drilling Barge,* 424 F.2d 684 (5th Cir.), *cert. denied,* 400 U.S. 832 (1970); *Grigsby* v. *Coastal Marine Ser.,* 412 F.2d 1011, 1039 (5th Cir. 1969), *cert. denied,* 396 U.S. 1033 (1970); *Ammesmaki* v. *Interlake Steamship Co.,* 342 F. 2d 627 (7th Cir. 1965); *Read* v. *United States,* 201 F.2d 758 (3d Cir. 1953); *Connors* v. *Brown S.S. Co.,* 115 F.Supp. 775 (W.D.N.Y. 1953). See also cases at note 7, *supra,* and note 11, *infra.*

[9] *E.g., McLaughlin* v. *Trelleborgs Angfartygys,* 408 F.2d 1334 (2d Cir.), *cert. denied,* 395 U.S. 946 (1969).

Erie does not owe contribution even under the Fifth Circuit view of *Halcyon*—that contribution is permitted unless one party is immune from suit by statute[10]—but that view is clearly erroneous, as recognized by the court in *In re Standard Oil Co., supra. Halcyon* has consistently been held to bar contribution, even where, contrary to the Fifth Circuit view, neither "tortfeasor" is protected from liability by statute.[11]

Despite this repeated reliance on *Halcyon,* and despite the clear invitation by the Court in *Halcyon* and subsequent cases to those who advocate a change in the rule to step forward and present their case, they have failed to do so. Those individuals, organizations, companies, labor groups, government agencies and federal departments most knowledgeable in the field and most likely to be concerned about the injustices, anomalies and inconsistencies which Atlantic alleges to exist have in fact shown no concern at all about *Halcyon.* The annual reports of the Maritime Administration, for example, reveal that at no time since 1952 has the Administration discovered any of the dire consequences alleged by Atlantic. The Interior, Treasury, Justice and Commerce Departments, the International Longshoremen's Association, and the myriad other groups which regularly present their views to Congress on issues of importance in the maritime field have not urged that *Halcyon* be overruled, as surely they would have if the picture were as Atlantic paints it.

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[10] *Horton & Horton, Inc.* v. *T/S J. E. Dyer,* 428 F.2d 1131 (5th Cir. 1970), *cert. denied,* 400 U.S. 993 (1971).

[11] *E.g., Transcontinental Gas Pipe L. Co.* v. *Mobile Drilling Barge, supra; Davis* v. *Associated Pipe Line Const. Co.,* 305 F.Supp. 1345 (W.D. La. 1968), *aff'd,* 418 F.2d 920 (5th Cir. 1969), *cert. denied,* 397 U.S. 988 (1970); *Ardoin* v. *Union Oil Co.,* 226 F.Supp. 192 (W.D. La. 1964).

Bills *have* been introduced in Congress which would have had the effect of changing the *Halcyon* rule and allowing contribution in cases such as this one.[12] See, by

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[12] S. 2313, a bill: "to unify apportionment of liability in cases of collision between vessels, and related casualties," was introduced in the 1st Session of the 87th Congress by Senator Magnuson on July 26, 1961, and was referred to the Commerce Committee's Subcommittee on Merchant Marine and Fisheries. Hearings were held by the Subcommittee on March 1 and 2, 1962. 87th Cong., 2nd Sess. Serial #53. On March 23, 1962, the bill was considered in executive session by the full Committee and ordered reported favorably with amendments not relevant here. The bill was reported by Senator Bartlett on June 15, 1962, with the title, "Unifying Apportionment of Liability in Collisions and Other Maritime Casualties." S. Rep. No. 1603, 87th Cong., 2nd Sess. (1962). On September 28, 1962, consideration of the bill was indefinitely postponed.

H.R. 7911, the companion bill to S. 2313 which shared its title, was introduced in the 1st Session of the 87th Congress by Congressman Garmatz on June 28, 1961, and was referred first to the Committee on Merchant Marine and Fisheries and then to the Subcommittee on Merchant Marine. Comments were sought and received from the General Accounting Office and the Departments of the Treasury, Commerce, Justice and State. The Subcommittee took no further action on the bill.

S. 555 (see Appendix A hereto) was similar in all significant aspects to S. 2313 of the 87th Congress, as amended by the Commerce Committee. S. 555 was introduced in the 1st Session of the 88th Congress by Senator Bartlett on January 28, 1963, and referred to the Subcommittee on Merchant Marine and Fisheries of the Commerce Committee. Hearings were held on May 20 and 22, 1963 (88th Cong., 1st Sess. Serial #22), and on December 9, 1963, the bill was considered in executive session by the Subcommittee and reported favorably to the full Committee with an amendment in the nature of a substitute. *The amendment changed the bill so as to make it applicable solely to collision cases.* The bill, as reported, was considered by the full Committee in executive session on December 10, 1963, but no further action was taken.

H.R. 1070 was identical in language to H.R. 7911 of the 87th Congress and similar to S. 555 of the 88th Congress. H.R. 1070 was introduced in the 1st Session of the 88th Congress by Congressman Garmatz on January 9, 1963, and referred to the Com-

way of example, Sections 4(a), 4(b) and 9 of S. 555, printed as Appendix A to this Brief. Significantly, however, the only committee report available[13] indicates that Congress was *not* concerned about the *Halcyon* rule, despite the plain language of these bills. Even more to the point, the *bills were never even reported out of committee, much less approved by Congress.*

Thus, whether we treat the history of these bills as evidence that Congress is disinterested in changing the present rule or as an outright rejection by Congress of any change, the message is clear: on a question which this Court said "the legislative process is peculiarly adapted to determine", Congress has answered, and the answer is that the present state of law should remain in effect.[14]

That answer is particularly appropriate where the affected statutes must all be made to interlock (see note 4, *supra*) and where Atlantic's claims would affect the intricate relationships between a myriad group of maritime personnel and businesses, including longshoremen, crewmen, shipowners, stevedoring com-

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mittee on Merchant Marine and Fisheries. Comments were sought and received from the General Accounting Office and the Departments of the Treasury, Commerce, Justice and State. The bill was not even referred to a Subcommittee, and no further action was taken.

[13] See n. 12, *supra*.

[14] It is important to emphasize, as mentioned in n. 12, *supra*, that while these bills originally would have applied to both collision and non-collision cases, they were specifically changed in committee to apply only in collision cases. Thus, there has been congressional recognition of the very distinction between collision and non-collision cases that Atlantic wants this Court to abolish in the area of maritime contribution.

panies, bareboat charterers, cargo consignees and others. As the Court said in *Victory Carriers, Inc.* v. *Law, supra,* "Claims like these are best presented in the legislative forum, not here." 40 U.S.L.W. at 4063. Reaffirming the important role of Congress in maritime personal injury matters, the Court there declined to extend general admiralty jurisdiction to accidents on land.[15] The Court's conclusion in the *Law* case is equally apt here:

> [I]f denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Articles I and III of the Constitution to enact a suitable solution. [*Id.* at 4064.]

Deference to Congress is also appropriate when the Court is faced with facts like those in the instant case. While maritime law clearly governs,[16] this is hardly the typical maritime personal injury case. The injured worker here was a railroad yardman—not a seaman or a longshoreman—and all the other involved parties were railroad companies—not shipowners or stevedoring companies. Despite Atlantic's understandable wish to dilute its obligation, this is not a proper setting for wholesale changes in established maritime doctrine.

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[15] Since the injury was not caused by the "vessel," the Admiralty Extension Act, 62 Stat. 496, 46 U.S.C. § 740, did not apply. *Victory Carriers, Inc.* v. *Law, supra,* 40 U.S.L.W. at 4062.

[16] That this was clearly a maritime accident covered by the Longshoremen's Act, despite Benazet's railroad employment and activities, was settled in *Pennsylvania R.R. Co.* v. *O'Rourke,* 344 U.S. 334 (1953). See also *Kermarec* v. *Compagnie Generale, supra,* 358 U.S. at 628, and *Victory Carriers, Inc.* v. *Law, supra.*

2. The present rule is the correct one.

Even if this Court were to make an independent review of the contribution rule, rather than leaving the matter to Congress, we respectfully submit that the proper conclusion to be reached by the Court is that there should be no contribution among tortfeasors in non-collision, maritime personal injury cases. First, this result is entirely consistent with prior case law. Secondly, it achieves the end result sought by the Court—to place maximum responsibility for correcting defects upon the party most able to do so. Thirdly, allowing contribution would clearly violate Section 5 of the Longshoremen's Act if Erie actually had to pay any amount to Atlantic. And finally, a holding that contribution is owed in this case would be an empty gesture in the light of Erie's almost certain right to obtain full indemnity from Atlantic.

(a) An absence of contribution is fully consistent with prior case law.

One problem with this case as a context for drastic change in maritime doctrine is the difficulty of placing the parties into the typical maritime setting. Found initially liable for its defective boxcar, Atlantic, though negligent, assumes the same position as the non-negligent shipowner initially liable for unseaworthiness. Like the non-negligent shipowner, the negligent Atlantic seeks to shift liability to a third party or to dilute its liability. As recognized below, however, this Court's prior rulings are either inconsistent with such a result or are clearly distinguishable from it.

Thus, the rulings which have established liability on the part of a shipowner to a longshoreman for unseaworthiness have not involved the liability of third

parties, whether by contribution, indemnity, or otherwise.[17] One case establishing liability on the part of a shipowner to a stevedoring company not only failed to award contribution but specifically distinguished the contribution situation.[18] All of the cases setting forth the liability of stevedoring companies to shipowners or vessels have been indemnity rather than contribution cases,[19] and they have carefully noted the important differences between the two types of recovery. For example, as the Court said in *Italia Societa* v. *Oregon Stevedoring Co., supra,* 376 U.S. at 321, " *** recovery of contribution between joint tortfeasors and recovery of indemnity for breach of warranty proceed on two wholly distinct theories and produce disparate results."[20] Contribution is imposed by law and is measured by relative fault or is shared equally, whereas indemnity is not necessarily affected

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[17] *E.g., Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn, supra; Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 731 (1967).

[18] *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., supra,* 394 U.S. at 417-418.

[19] *E.g., Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Co., supra; Crumady* v. *The Joachim Hendrik Fisser,* 358 U.S. 423 (1959); *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.,* 364 U.S. 421 (1960); *Italia Societa* v. *Oregon Stevedoring Co., supra.* The one case establishing liability on the part of a stevedoring company to a longshoreman did so on the basis of unseaworthiness. *Reed* v. *The Yaka,* 373 U.S. 410 (1963).

[20] The Court cited *American Stevedores* v. *Porello,* 330 U.S. 446 (1947); *Crawford* v. *Pope & Talbot, Inc.,* 206 F.2d 784 (3d Cir. 1953); *Rich* v. *United States,* 177 F.2d 688 (2d Cir. 1949); *McFall* v. *Compagnie Maritime Belge, S.A.,* 304 N.Y. 314, 107 N.E.2d 463 (1952), and Weinstock, "The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers," 103 U. Pa. L. Rev. 321 (1954).

or defeated by the shipowner's negligence. And, said the Court, the stevedoring company's obligation which results in indemnity is not the same as that which results in contribution. And see *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp., supra,* 350 U.S. at 133; *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., supra,* 394 U.S. at 421 n. 25. Therefore, Atlantic's reliance on indemnity cases is clearly misplaced.[21]

(b) A refusal to permit contribution achieves the best results.

While at first glance it might seem only fair and just that tortfeasors share in a negligence recovery by an injured worker, the fact is that such a result fails to further, and in fact frustrates, the basic purpose of the various safety statutes and this Court's decisions. In this regard, it is important to remember that *Halcyon* is more than a case which has beeen followed and applied by the courts for twenty years. The *Halcyon* rule against contribution has also become a premise for the still developing maritime system for preventing, as well as compensating for, injuries to harborworkers and longshoremen and allocating the economic losses

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[21] *Moragne* v. *States Marine Lines,* 398 U.S. 375 (1970), relied upon by Atlantic, does not argue for drastic judicial action here. In *Moragne,* the Court overruled an 1886 decision holding that admiralty recognized no wrongful death remedy. The overruled decision had frozen admiralty to the general state of the law in the 1880's and had worked clear injustice by denying a remedy to obviously injured parties. To the contrary, *Halcyon* was an outgrowth of, and is a bulwark for, the expansive remedy for unseaworthiness, and has been the foundation for a comprehensive system of allocating personal injury losses in a hazardous industry. To paraphrase a recent statement by the Court (*Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212, 224 (1969)), the invitation to change the *Halcyon* rule "must be addressed to Congress, not to this Court."

when they occur. The *Halcyon* Court declined to permit contribution in part because the Court was not "wholly convinced that it would best serve the ends of justice." 342 U.S. at 285. While subsequent developments have confirmed the Court's wisdom, we should keep constantly in mind that our concern must be with the rights and obligations of longshoremen, stevedores, shipowners, stevedoring companies and others directly affected in the maritime field, for it is their interests, and not the interests of yardmen and railroads, that will be adversely affected by an overturning of *Halcyon* in the context of this case.

Halcyon was preceded by *Seas Shipping Co.* v. *Sieracki, supra.* There, this Court extended the shipowner's obligation of seaworthiness to longshoremen as well as to seamen.[22] The shipowner was thus held liable to the longshoreman, despite a finding that the shipowner had not been negligent.[23] Longshoremen, who performed functions traditionally considered ship's work, were entitled to the same benefits which the

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[22] Sieracki, a longshoreman injured when a ship's boom broke, had sued the shipowner and the companies which had built the ship. The District Court found the shipowner not negligent but gave judgment against the shipbuilders for negligence. The Court of Appeals agreed that the shipowner was not negligent, but ruled that Sieracki could nonetheless recover for the ship's unseaworthiness. This Court affirmed but expressly noted that its decision did not affect possible shipowner rights against the shipbuilders, who were not parties in this Court.

[23] This points up an important parallel to the instant case, where any liability running against Erie, for whatever reason, would almost certainly be recovered from Atlantic by indemnity. See Subsection (e) below.

hazards of the service had conferred upon seamen;[24] one of those benefits was the remedy for unseaworthiness.

The shipowner's obligation of seaworthiness had long been liberally extended to seamen, who were considered "ward[s] of the admiralty."[25] The obligation had developed in large part from a recognition of the particular dangers inherent in ship's work,[26] as well as from a recognition that seamen were typically ill-equipped to bear the financial loss of their injuries. Grounded in these considerations, the warranty of seaworthiness was not limited by "conceptions of negligence."[27] For example, the shipowner's freedom from negligence is no defense, he cannot delegate his duty to protect against unseaworthiness, and he cannot avoid his responsibility by turning control of the ship over to a stevedoring company.[28] The *Sieracki* Court summarized:

> [The obligation of seaworthiness] is essentially a species of liability without fault analogous to

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[24] "[F]or injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner." 328 U.S. at 99; footnote deleted.

[25] *E.g., Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 103 (1944); *The Osceola*, 189 U.S. 158 (1903).

[26] *E.g., Seas Shipping Co.* v. *Sieracki, supra; Krey* v. *United States*, 123 F.2d 1008 (2d Cir. 1941).

[27] *Seas Shipping Co.* v. *Sieracki, supra*, 328 U.S. at 94.

[28] *Crumady* v. *The Joachim Hendrik Fisser, supra*, 358 U.S. at 427; *Italia Societa* v. *Oregon Stevedoring Co., supra*, 376 U.S. at 317 n.3; *Moragne* v. *States Marine Lines, Inc., supra*, 398 U.S. at 399.

> other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *** It is a form of absolute duty owing to all within the range of its humanitarian policy. [328 U.S. at 94-95.[29]]

To reiterate, in *Sieracki*, the longshoreman, injured due to the negligence of third parties, received an unseaworthiness award from the non-negligent shipowner. Moreover, under the Longshoremen's Act, Sieracki's employer recouped the compensation benefits under the Act from the money recovered from the shipowner.[30]

The *Halcyon* case followed directly from *Sieracki*. In *Halcyon*, the shipowner paid damages to Bačcile, a ship's carpenter employed by Haenn, for injuries sustained in a fall from defective stage planking provided by the ship.[31] Pursuant to instructions, the jury found that both Halcyon and Haenn had been negligent

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[29] The Court further distinguished unseaworthiness liability from negligence liability:

> That liability [for unseaworthiness] * * * rests upon an entirely different basis from that upon which recovery has been had against the * * * [shipbuilders who were negligent]. Such a liability therefore * * * [is] not joint but several * * *. [328 U.S. at 89.]

[30] *In re Sheffield Tankers Corp.*, 222 F. Supp. 441 (N.D. Cal. 1963) (right to reimbursement read into Section 33 of the Act, 33 U.S.C. § 933, which does not explicitly provide therefor); *The Etna*, 138 F.2d 37 (3d Cir. 1943).

[31] Baccile had sued the shipowner, Halcyon, which impleaded Haenn. Halcyon settled with Baccile, and the trial determined Halcyon's rights vis-a-vis Haenn.

and apportioned negligence.[32] The defective staging constituted unseaworthiness irrespective of negligence, however, for as the Court had noted in *Sieracki,* the obligation is "essentially a species of liability without fault." 328 U.S. at 94.[33] This Court denied contribution.

The *Halcyon* result, of course, was that the shipowner had to bear the entire burden of an unseaworthy condition despite a finding that third-party negligence was 75% responsible for the injury. Moreover, the employer of the injured worker, there the negligent third party, recouped benefits paid to the worker under the Longshoremen's Act.

The refusal to permit contribution was necessary to protect an important principle in *Sieracki*—that a shipowner's obligation of seaworthiness cannot be shared with or delegated to other parties. So long as the injured person is performing ship's work, the obligation is absolute. In *Sieracki,* the shipowner could not parcel its liability out to the negligent shipbuilders. By the same token the shipowner's duty in *Halcyon* was not to be diluted by third-party negligence. As the Court stated in *Sieracki,* "the obligation of seaworthiness * * * is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate." 328 U.S. at 100.

In *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co., supra,* the Court placed the ultimate burden of an unseaworthy condition upon the most respon-

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[32] *Baccile* v. *Halcyon Lines,* 89 F.Supp. 765 (E.D. Pa. 1950).

[33] See also *Mitchell* v. *Trawler Racer, Inc.,* 362 U.S. 539 (1960). Parenthetically, the trial court's instructions accurately described the standards of the seaworthiness duty.

sible party. As in *Halcyon,* the *Ryan* shipowner had been forced under *Sieracki* initially to pay damages to a longshoreman injured by unseaworthiness resulting from negligence actively caused by the longshoreman's employer, a stevedoring company. In *Ryan,* however, this Court required the stevedoring company fully to indemnify the shipowner, whose liability had resulted from the stevedore's breach of a warranty of workmanlike service.

The Court characterized the warranty as "of the essence of" the stevedoring contract and compared it to a "manufacturer's warranty of the soundness of its manufactured product."[34] An apparent obstacle, the Longshoremen's Act, was no bar, since the duty to indemnify the shipowner did not flow from the injured longshoreman but instead was the result of a separate contractual agreement between the stevedoring company and the shipowner.[35] *Halcyon* also was no obstacle, since that case prohibited a claim for contribution from one tortfeasor to another and did not bar a right to indemnity.

The warranty's status as a contractual duty became suspect, however,[36] and the true rationale of *Ryan,* as

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[34] 350 U.S. at 133-134. The same comparison has been made in other cases. *E.g., Crumady* v. *The Joachim Hendrik Fisser, supra,* 358 U.S. at 428-429; *Italia Societa* v. *Oregon Stevedoring Co., supra,* 376 U.S. at 318-319.

[35] 350 U.S. at 130-132. The Court further noted:

> A like result [indemnity] occurs where a shipowner sues, for breach of warranty, a supplier of defective ship's gear that has caused injury or death to a longshoreman using it in the course of his employment on shipboard. [*Ibid.*]

[36] In one departure from contract principles, *Crumady* v. *The Joachim Hendrik Fisser, supra,* the shipowner recovered on the warranty even though there was no privity of contract between

well as its relationship to *Sieracki* and *Halcyon*, became evident in Mr. Justice White's opinion for the Court in *Italia Societa* v. *Oregon Stevedoring Co., supra.* In that case, the stevedoring company was required to indemnify the shipowner for unseaworthiness liability due to a latent defect in equipment furnished by the stevedoring company. Found not negligent, the stevedoring company was nonetheless held liable because it had violated its warranty of workmanlike service. Significantly, the Court explicitly adopted the seaworthiness standard in defining the scope of the stevedoring company's obligation[37] and reasoned as follows:

> It is considerations such as these [opportunity to test, etc.] that underlie a manufacturer's or a seller's obligation to supply products free of defects and a shipowner's obligation to furnish a seaworthy vessel. They also serve to render a tort standard of negligence inapplicable to the stevedore's liability under its warranty of workmanlike service. *For they illustrate that liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury.* [376 U.S. at 323-324; emphasis added; footnote deleted.]

The Court also observed that this area of personal injury litigation is governed by

> rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for

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shipowner and stevedore. See also *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc., supra.* The contractual rationale for the warranty was attenuated further in *Reed* v. *The Yaka, supra,* where the Court characterized the *Ryan* result in unmistakable tort warranty terms. 373 U.S. at 414.

[37] 376 U.S. at 322 (quoting from *Mitchell* v. *Trawler Racer, Inc., supra,* 362 U.S. at 550).

> accidents that inevitably occur, and *to minimize the likelihood of such accidents.* [376 U.S. at 324; emphasis added.]

This emphasis upon liability resting on the party best able to prevent the unseaworthy condition has been reiterated on several occasions. In *Reed* v. *The Yaka, supra,* for example, the shipowner *pro hac vice* was held liable to the injured longshoreman for unseaworthiness despite the fact that it was also the longshoreman's employer and subject to Section 5 of the Longshoremen's Act. Like the stevedore in *Ryan,* the shipowner *pro hac vice* in *Reed* had supplied the cause of the injury—a defective pallet. Noting this similarity, the Court observed:

> In either case, under *Ryan,* the burden ultimately falls on the company whose default caused the injury. [373 U.S. at 414.]

And more recently, in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., supra,* Mr. Justice Stewart held for a unanimous Court that where the shipowner had failed to protect a deep tank opening into which a stevedore fell to his death, the stevedoring company could recover from the shipowner. The basis for recovery was indemnity, for the shipowner had violated its duty to provide a safe place to work. In so holding, Mr. Justice Stewart pointed out that the Court had recognized the objective of placing the ultimate burden on the party who caused the injury. 394 U.S. at 420 n. 22.

To summarize, *Sieracki* and *Halcyon,* by extending the warranty of seaworthiness, ensured that the injured worker will be fully compensated.[38] In appropriate instances, however, the *Ryan* warranty permits

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[38] This recovery is further guaranteed by the fact that the ship must respond *in rem* to an unseaworthiness liability. *Reed* v. *The Yaka, supra.*

a shift of liability from the shipowner (accountable for unseaworthiness) to the stevedoring company, but only when the stevedoring company is the party better-positioned to prevent the injury. The objective is attained:

> [T]he burden ultimately falls on the company whose default caused the injury.[39]

This system for shifting liability,[40] all premised upon the shipowner's initial responsibility, applies also where the third party is not a stevedoring company. In *Simpson Timber Co.* v. *Parks, supra,* for example, the shipowner, liable for unseaworthiness, recovered indemnity from the manufacturer of doors which were negligently packaged and which created the unseaworthy condition. The Court, refusing to permit the negligent manufacturer to benefit from the faultless shipowner's nondelegable duty of seaworthiness, added this significant comment:

> Moreover, by imposing ultimate liability upon the negligent manufacturer, the loss is placed upon the actor whose default caused the injury. *The one best able to eliminate the risk is given the greatest incentive to do so.* [390 F.2d at 356; emphasis added.]

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[39] *Reed* v. *The Yaka, supra,* 373 U.S. at 414.

[40] The shipowner is not always indemnified, however. *E.g., Vaccaro* v. *Alcoa Steamship Co.,* 405 F.2d 1133 (2d Cir. 1968); *Quadrino* v. *S.S. Theron,* 323 F.Supp. 1037 (S.D.N.Y.), *aff'd,* 436 F.2d 959 (2d Cir. 1970). Indeed, an "active-passive" standard has developed, under which an actively negligent shipowner cannot recover from a third party, *e.g., Humble Oil & Refining Co. v. Naquin,* 414 F.2d 912 (5th Cir. 1969); see *Halliburton Co.* v. *Norton Drilling Co.,* 302 F.2d 431 (5th Cir. 1962), *cert. denied,* 374 U.S. 829 (1963), nor can an actively negligent third party, including a stevedoring company, defeat indemnity by reason of passive or secondary negligence of the shipowner. *E.g., Tri-State Oil Tool Indus.* v. *Delta Marine Drill Co.,* 410 F.2d 178 (5th Cir. 1969); *Nikiforow* v. *Rittenhouse,* 319 F.Supp. 697 (E.D. Pa. 1970).

The Second Circuit Court of Appeals has also aptly described the *Sieracki-Ryan-Simpson Timber* system of loss allocation and its salutary purpose of inducing precaution:

> The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved. [*De Gioia* v. *United States Lines Co.*, 304 F. 2d 421, 426 (2d Cir. 1962). And see *Ferrigno* v. *Ocean Transport Ltd.*, 309 F. 2d 445 (2d Cir. 1962).]

This system of initial shipowner liability under *Sieracki*, with indemnification where appropriate from third parties under *Italia Societa*, *Simpson Timber* and other cases, is fundamentally incompatible with the recognition of a right to contribution. Indeed, the very structure of the system—initial liability with subsequent rights to indemnification—is premised upon the fact that *Halcyon* precludes contribution. This is illustrated, as noted above, by the regularity with which this Court has, in the process of refining and developing the *Sieracki* and *Ryan* doctrines and their interplay, noted the distinction between the indemnity provided in *Ryan* and the contribution prohibited by *Halcyon*. *Halcyon* was inevitable after *Sieracki*, and *Ryan* followed directly from *Halcyon*. Overturning *Halcyon* would thus immediately and fundamentally jeopardize a system on which all interests in the industry have depended since *Ryan*, and which Congress has apparently sanctioned as well.

Atlantic suggests that *Halcyon* has worked "manifest injustice." Assuming, however, that *Halcyon* is

the only bar to contribution in this case and in the typical *Ryan* situation, a rule permitting contribution would be peculiarly ill-suited to the maritime personal injury area. As we have seen, *Ryan* and its progeny place ultimate liability on the party best able to take precaution against accidents. *Sieracki,* built upon the premise that the industry is a hazardous one,[41] also requires that the ultimate burden, once placed where it should be, must not be diluted or shared, as would be the effect if not the purpose of contribution. This objective is well-served by a rule making the party best situated to prevent accidents pay the entire cost of those that occur. In such a fashion, the "super-care"[42] critical in a hazardous industry can best be achieved.

In the instant case, Erie was only one of 49 railroads that had had the defective boxcar in its possession during the two-year period when the defects should have been obvious. All 49 railroads had a duty to inspect the boxcar and correct the defects. But the fact remains that it was the owner of the boxcar, Atlantic, which had the greatest opportunity, the most manifest duty, and presumably the greatest incentive to inspect and correct. Not only did Atlantic have the car in its possession eight times during this period—more than any other railroad but one (the Pennsylvania Railroad)—but the testimony demonstrated Atlantic's primary duty, as the owner of the boxcar,

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[41] As the Court so recently noted in *Victory Carriers, Inc.* v. *Law, supra,* 40 U.S.L.W. at 4063 n.15, a survey has concluded that the stevedoring occupation had the highest injury frequency rate of the high-hazard industries studied.

[42] See Proudfoot, "The Tar Baby": Maritime Personal-Injury Indemnity Actions, 20 Stan. L. Rev. 423, 445 (1968).

to take special care that not only particular defects but normal excessive wear be corrected. As stated by one expert whose experience as railway car inspector and supervisor of inspectors for the New York Central Railroad spanned over 40 years (A-23-24):

> If you are trying to ask me what our practices were in accepting our own cars back in interchange, what the inspection consisted of, is this what you want to know?
>
> Q. That is exactly what I want to know.
>
> A. Well, primarily all the inspections are identical. When we hit our own home cars we look for cardable damage, cardable damages is an expression where someone is responsible for damages to your equipment that has not been repaired or reported.
>
> We look for these defects to protect our own company, and we also look for normal excessive wear that might in the near future, cause our car to be cut out. We like to send them to our own shops and repair them. The reason for this is on repair tracks we open the doors, the cars are empty, we examine the interior, sometimes we repair the flooring, the side lining to keep the cars in good condition.
>
> There is a type of repair and maintenance that is not normally done on other railroads, but all the inspections are the same. [A-33-34.]

Surely, to dilute the responsibility of the owner of the defective boxcar under circumstances such as these would not be in the interest of either railroad or maritime safety. To require contribution from Erie—and ultimately, perhaps, from all other railroads that fail to discover and correct defects—would take away the very incentive that this Court has so carefully attempted to impose over the years in its various decisions. The party "best able to eliminate the risk"

would be in part rewarded for its failure to do so, much as if a shipowner were able to contract away part of his duty to provide a seaworthy ship.

Conceptually as well as practically, contribution is ill-suited to a maritime personal injury action. The keystone of such actions, of course, is the obligation of unseaworthiness, which is absolute[43] and unbounded by negligence principles.[44] Consequent rights of indemnification are similarly unrestricted, and shipowner negligence does not necessarily preclude indemnity.[45] As this Court has observed, however, contribution is keyed to notions of negligence, not allocations of risk:

> Recovery in contribution is imposed by law and is measured by the relative fault of the joint tortfeasors or shared equally between them.[46]

If shipowners' and stevedores' liabilities were measured solely by negligence-fault principles, then perhaps contribution would appropriately serve to divide losses due to joint and mutual fault with respect to the injured worker. But such liabilities are not measured that way, and neither would Erie's be here. Instead,

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[43] *E.g., Mitchell* v. *Trawler Racer, Inc., supra.* See also p. 19, *supra.*

[44] While most shipowner negligence creates an unseaworthy condition, the converse is not true, and negligence and unseaworthiness have been recognized as independent grounds of recovery which lead to different results. *E.g., Weyerhaeuser* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958); *Lusich* v. *Bloomfield S.S. Co.*, 355 F.2d 770 (5th Cir. 1966).

[45] *Italia Societa* v. *Oregon Stevedoring Co., supra* (stevedore as indemnitor); *Tri-State Oil Tool Indus.* v. *Delta Marine Drill Co., supra* (secondarily negligent shipowner recovers).

[46] *Italia Societa* v. *Oregon Stevedoring Co., supra,* 376 U.S. at 321.

the respective liabilities are determined by entirely different considerations, which are ultimately intended to induce "super-care" in a hazardous enterprise. The Court has made this point quite clear, and it needs no further elaboration:

> [R]ecovery of contribution between joint tortfeasors and recovery of indemnity for breach of warranty proceed on two wholly distinct theories and produce disparate results.[47]

(c) The Longshoremen's Act precludes contribution.

Atlantic contends that the Fifth Circuit has read *Halcyon* to prevent contribution only where the tortfeasor from whom contribution is sought is protected from suit by a statute.[48] Even assuming that the Fifth Circuit view is correct—which it is not (see p. 11, *supra*)—Erie nevertheless meets the Fifth Circuit test because of Section 5 of the Longshoremen's Act, 33 U.S.C. § 905. This section provides in pertinent part:

> *The liability of an employer* prescribed in section 904 of this title *shall be exclusive and in place of all other liability of such employer to* the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death* * * *. [Emphasis added.]

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[47] *Italia Societa* v. *Oregon Stevedoring Co., supra*, 376 U.S. at 321.

[48] *Horton & Horton, Inc.* v. *T/S J. E. Dyer, supra*; see also *In re Seaboard Shipping Corp. and Moran Inland Waterways Corp.*, N.Y.L.J. Oct. 8, 1971, p. 1 (2d Cir. Sept. 29, 1971). In effect, this view completely discards *Halcyon*, since basic principles of contribution would preclude contribution from such a "protected" tortfeasor.

This Court did not have to reach the question in *Halcyon* as to whether this provision prohibits contribution between an employer and a shipowner, because it held that no such right to contribution exists in non-collision cases. However, the Court would have to face that issue in the instant case if it were disposed to rule that the right to contribution were otherwise available.

We submit that, for at least two reasons, Section 5 prohibits the payment of contribution from Erie to Atlantic in this case.

First, the statutory language is clear and unambiguous. It makes compensation payments under the Longshoremen's Act the "exclusive" liability and "in place of all other liability" not only to the employee but to anyone else "otherwise entitled to recover damages * * * on account of such injury or death * * *." The purpose was clear. In doing away with all normal defenses and making the employer's duty an absolute one to pay compensation, regardless of fault, the Act granted a *quid pro quo:* freedom from liability *other than* compensation payments.

Erie, an employer subject to the Longshoremen's Act, has had to make—and has made—compensation payments to the injured Beriazet, regardless of Erie's negligence.[49] Having done so, under the clear terms of the Act, Erie cannot be forced to pay additional damages to Atlantic where, as here, there was no indemnity situation.

There is a second reason why the Act prohibits contribution. Like the employer in *Halcyon,* from whom contribution was sought, Erie is statutorily insulated

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[49] *Pope & Talbot, Inc.* v. *Hawn, supra.*

from a negligence action by its employee, Benazet.[50] As the Fifth Circuit has stated:

> [T]he Act's exclusive liability provision effectively abrogates any independent tort liability of the employer to its employees * * *.[51]

Even assuming contribution is permitted in admiralty, contribution requires mutual liability to the injured party by joint tortfeasors.[52] Since Erie is not answerable in negligence to its employee, it cannot be a joint tortfeasor with a negligent third party.

In *American Mutual Liability Ins. Co.* v. *Matthews, supra,* decided prior to *Halcyon,* the shipowner sought contribution from the stevedoring firm which employed the injured longshoreman. Contribution was denied on the following rationale:

> [T]he statute exempts the employer from any duty to pay damages for negligently injuring his employee and substitutes therefor an absolute duty to pay the prescribed compensation. For a right of contribution to exist between tort-feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. In the case at bar the shipowner and the stevedoring firm were not under a common liability to the injured em-

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[50] 33 U.S.C. § 905; *Crawford* v. *Pope & Talbot, Inc.,* 206 F.2d 784 (3d Cir. 1953); *American Mutual Liability Ins. Co.* v. *Matthews,* 182 F.2d 322 (2d Cir. 1950).

[51] *Ocean Drilling & Exp. Co.* v. *Berry Bros. Oilfield Ser.,* 377 F.2d 511, 514 (5th Cir.), *cert. denied,* 389 U.S. 849 (1967). Ruling that the Act prevented indemnification on a tort theory, the court also noted that *Halcyon* barred contribution.

[52] See, *e.g., Simpson Timber Co.* v. *Parks, supra; Amerocean S.S. Co.* v. *Copp, supra.*

> ployee, nor were they joint wrongdoers. His claim against his employer was not for damages, as was his claim against the shipowner, nor was it dependent upon any tort committed by his employer. Consequently the shipowner can have no right to contribution based on the theory that they were joint tort-feasors. [182 F.2d at 323; footnote deleted.]

Under this reasoning, which has been approved by this Court,[53] Erie cannot be deemed a joint tortfeasor subject to claims for contribution because joint tortfeasor status presumes potential mutual liability. Any possible mutual liability here would be for negligence, but negligence liability for Erie has been abolished by the Act in favor of its absolute duty to pay compensation benefits. Since Erie cannot be directly liable to Benazet for negligence, it cannot be held indirectly liable through a contribution claim by Atlantic.

Reed v. *The Yaka, supra,* and *Jackson* v. *Lykes Bros. S. S. Co., supra,* do not change this result. In these cases, the Court held that a longshoreman's remedy for unseaworthiness is not defeated by the fact that the shipowner is also the longshoreman's employer. The exclusive liability feature of the Act does not insulate a shipowner-employer from unseaworthiness liability. Noting the "dominant intent of Congress to help longshoremen," the Court would not uphold a construction of the Act which would withdraw unseaworthiness recovery from a longshoreman simply because the shipowner happened to be his

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[53] See *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Co., supra,* 350 U.S. at 133.

employer.[54] This would be an "incongruous, absurd, and unjust result." *Jackson* v. *Lykes Bros. S.S. Co., supra,* 386 U.S. at 735.

Atlantic, assuming that *Halcyon* applies only when the potential contributor is protected from suit,[55] and assuming also that Atlantic's defective boxcar rendered Erie's carfloat unseaworthy,[56] contends that the *Reed* and *Jackson* cases remove any bar to contribution. Atlantic urges that since the Act thus did not affect Erie's *unseaworthiness* liability to Benazet, Erie was a "joint tortfeasor" and thus was properly subject to a contribution claim.

This argument is without merit. Potential Erie liability for unseaworthiness to Benazet did not make it a joint tortfeasor with a negligent Atlantic. In *Simpson Timber Co.* v. *Parks, supra,* the negligent manufacturer contended that the shipowner's liability for unseaworthiness made it and the manufacturer

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[54] The Court confirmed an earlier statement that the Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Reed* v. *The Yaka, supra,* 373 U.S. at 415 (quoting from *Voris* v. *Eikel,* 346 U.S. 328, 333 (1953)).

[55] This assumption is erroneous, as we have shown.

[56] The warranty of seaworthiness extends to "appliances appurtenant to the ship." *The Osceola, supra,* 189 U.S. at 175. While the obligation has been broadly construed, *e.g., Gutierrez* v. *Waterman Steamship Co.,* 373 U.S. 206 (1963), it is not without limit. *Morales* v. *City of Galveston,* 370 U.S. 165 (1962). Indeed, under *Victory Carriers, Inc.* v. *Law, supra,* there may be some question whether the boxcar was an "appliance appurtenant" to the carfloat. Of course, the issue of unseaworthiness is a question of fact for the jury. E.g., *Mahnich* v. *Southern S.S. Co., supra; Blier* v. *United States Lines Co.,* 286 F.2d 920 (2d Cir.), *cert. denied,* 368 U.S. 836 (1961).

joint tortfeasors, thereby precluding the shipowner's claim for indemnity. The court did not agree. The court ruled that the shipowner and the negligent third party were not joint tortfeasors, stressing that unseaworthiness liability was not restricted by principles of fault or negligence. As we have shown earlier, unseaworthiness and negligence liabilities are different in character and lead to different and disparate results. Treating them the same to permit contribution would produce "manifest injustice" by defeating various actions, including those for indemnity by non-negligent shipowners against negligent third parties.

The purpose of *Reed* and *Jackson* was to avoid an unjust denial of unseaworthiness benefits to a group of longshoremen. Holding only that the Act was no bar to unseaworthiness recovery, *Reed* and *Jackson* did not open the way to employers' negligence liability to employees, which would be the effect of a contribution award. More specifically, *Reed* and *Jackson* might possibly have made Erie liable to Benazet for unseaworthiness, but they did not otherwise affect Section 5 of the Act, which still protects Erie both from liability to Benazet for negligence and from contribution based on negligence in favor of Atlantic.

A recent Court of Appeals case is instructive. In *Mendez* v. *States Marine Lines, Inc.*, 421 F.2d 851 (3d Cir.), *cert. denied*, 398 U.S. 959 (1970), the deceased drowned in a collision between a ship and a launch, both found to be negligent.[57] The shipowner sought contribution from the deceased's employer, which had hired the launch (an independent contractor). Under

[57] Since a collision was involved, the *Halcyon* rule did not bar contribution.

the Jones Act, the launch's negligence would be attributed to the employer, since the employer (also a shipowner) was obligated to give crewmen safe transport to and from the ship. It did not follow, however, that the launch's negligence would be similarly attributed to the employer for purposes of a contribution claim. As the court stated:

> The Jones Act was enacted for the benefit of seamen. * * * The Jones Act was *not* designed to extend ship owner's liability regarding other ship owners. [421 F. 2d at 853; emphasis in original.]

By the same token, while *Reed* and *Jackson* extended the unseaworthiness remedy to longshoremen employed by shipowners, they did not confer new rights on negligent *third* parties seeking contribution.

A use of potential unseaworthiness liability under *Reed* and *Jackson* to permit contribution for negligence would require an unprecedented disregard for Section 5 of the Longshoremen's Act. No decision before or since *Halcyon* even suggests that the Court should on this occasion disregard the clear meaning of the Act. The effect of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Co., supra,* may have been to expose the stevedoring company to liability in addition to compensation under the Act, but that liability resulted from a contractual relationship with the shipowner which was unaffected by the Act:

> While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the

shipowner, to load the cargo properly. [350 U.S. at 131.]

Similarly, in *Reed* and *Jackson*, the Court subordinated a literal reading of the statute to two important humanitarian objectives of maritime personal injury law: (1) the preservation of the absolute and nondelegable character of the seaworthiness duty, and (2) the extension of the seaworthiness remedy to all who do ship's work. Here, unlike *Ryan*, there is no relationship, contractual or otherwise, which gives Atlantic a right to indemnity from Erie. Indeed, Atlantic abandoned a claim for indemnity from Erie, and the District Court ruled that the evidence showed Atlantic not entitled to indemnity. A-86. Moreover, since Benazet has received full compensation for his injuries, no incongruous result or other policy reason exists, as in *Reed* and *Jackson*, to subordinate the wording of the Act for a humanitarian result.[38]

That this is the correct interpretation of the Court's cases to date is demonstrated by *Italia Societa* v. *Oregon Stevedoring Co., supra.* Although the Court allowed a shipowner indemnity from an employer-stevedoring company on a breach of warranty for supplying defective, injury-producing equipment, the Court went out of its way to distinguish, on at least two different grounds, indemnity recovery for breach of warranty and contribution due to negligence liability. Any negligence liability of the employer is based upon its obligation to the employee and is thus specifically barred by the Longshoremen's Act, whereas the stevedoring company's warranty is totally separate

[38] *Weyerhaeuser S.S. Co.* v. *United States, supra*, stressed by Atlantic, is inapposite. There, the statutory language, far from clear, was construed so as to avoid conflict with the age-old admiralty divide-damages rule for collisions.

from any obligation it owes to its employee.[59] And, as seen in *Simpson Timber Co., supra,* a shipowner's liability for unseaworthiness cannot be equated with negligence for contribution purposes.

(d) Since Erie could obtain indemnity from Atlantic, contribution is pointless.

Atlantic would bear the ultimate liability if this case, like most cases of shipboard injury, had been tried as a maritime case from the beginning. Benazet, the injured party, would have sued Erie, the owner of the carfloat, alleging that Atlantic's defective boxcar made the carfloat "unseaworthy."[60] As Benazet's employer, Erie would be protected by the Longshoremen's Act from negligence liability, but possibly could be subjected to liability for unseaworthiness without regard to negligence.[61]

Like the shipowner in countless other cases, Erie would, by impleading Atlantic, then shift its liability to the party responsible for the unseaworthy condition. As we have seen, the jury found Atlantic negligent in failing to discover and repair its boxcar's defective brake and brake platform, and the District Court specifically found that there was no intervening cause of the accident.

Under the cases, Atlantic's liability in indemnity would have been clear. In *Simpson Timber Co.* v.

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[59] If we are wrong in our interpretation of the cases, we respectfully urge the Court to adopt the reasoning of Mr. Justice Stewart's dissent, joined by Mr. Justice Harlan, in *Jackson* v. *Lykes Bros. S.S. Co., supra,* 386 U.S. at 736. The Longshoremen's Act clearly prohibits a contribution recovery against the employer.

[60] As we have noted, whether or not Atlantic's boxcar rendered the carfloat unseaworthy is a question of fact.

[61] *Jackson* v. *Lykes Bros. S.S. Co., supra; Reed* v. *The Yaka, supra.*

Parks, supra, a longshoreman, injured due to defective packaging of a bundle of doors, sued the shipowner alleging unseaworthiness. (In maritime terms, Atlantic's boxcar may have been "defective packaging.") The shipowner, held liable for unseaworthiness, recovered indemnity from the manufacturer of the doors, who was found negligent.

The jury finding of Erie negligence, based on an instruction framed according to contribution principles, would not preclude indemnity. In admiralty, "passive" negligence does not bar an award of indemnity from a third party whose negligence is "active," "primary," or "affirmative."[22] As the Fifth Circuit has observed, "The active-passive distinction, when made, usually contrasts the conduct of one who simply had custody of the cause of injury and failed to discover the danger created by another." *Watz* v. *Zapata Off-Shore Co.,* 431 F.2d 100, 120 (5th Cir. 1970). While the jury here answered affirmatively when asked if Erie's negligence was "a substantial factor" in bringing about Benazet's injuries, it was not asked and did not find whether Atlantic's negligence was also substantial, much less whether such negligence was more substantial than Erie's.

Under maritime law, Erie's negligence was clearly the "passive," and Atlantic's the "active", force at work. Therefore, Atlantic would indemnify Erie for any payment to Benazet resulting from defects in the boxcar. This being so, justice would

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[22] See n. 40, *supra.* Different principles produce equivalent results in the area of "contractual" indemnity, as by the stevedoring company. *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.,* *supra,* 355 U.S. at 569); *Italia Societa* v. *Oregon Stevedoring Co.,* *supra,* 376 U.S. at 320; *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., supra,* 394 U.S. at 420.

clearly not be served by allowing Atlantic to escape its burden of ultimate liability by the simple fortuity that admiralty jurisdiction was not fully recognized until after the trial was almost over. Even more to the point, if the Court were to hold that contribution is available, Erie would be entitled to a new trial with proper jury instructions and jury findings so that the indemnity issue could be resolved. In view of the almost certain outcome on the admitted facts, making contribution available in this case would be an empty gesture.[63]

3. State law is inapplicable.

Atlantic argues in the alternative for a ruling that the New Jersey Joint Tortfeasors Contribution Law should be applied to permit contribution from Erie. This contention must be rejected.

First, admiralty will adopt state law only where no maritime rule exists.[64] Here, of course, an established rule does exist. As the Court of Appeals recog-

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[63] Even if Erie were not entitled to a new trial on the issues of indemnity, it would be entitled to such a new trial if this Court were to adopt the "relative degree of fault" test for determining the amount of contribution which Erie owed Atlantic, since a jury would have to decide the amount owed by each. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, 342 U.S. at 283, 286-287. This, however, is not the only choice open to the Court if *Halcyon* is overruled. It could adopt a 50-50 split between Atlantic and Erie (*id.* at 284 n.5, 286-287), or some other form of split. *E.g.*, *id.* at 283, 286-287. There would also be the question whether Erie could deduct from the amount it owed in contribution the compensation payments it has made to Benazet under the Longshoremen's Act. See *Pope & Talbot, Inc.* v. *Hawn*, *supra*, 346 U.S. at 411-412. Each of these are difficult questions which have not been fully briefed or argued by either Atlantic or Erie.

[64] *E.g.*, *Hess* v. *United States*, 361 U.S. 314 (1960); *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.*, *supra*.

nized, *Halcyon* "squarely held there is *no right of contribution* among tort feasors in a non-collision case." A-99; emphasis by the Court.

Second, since the *Halcyon* rule underpins the entire legal system of maritime personal injury litigation, any change in the rule *must* apply with uniformity. However destructive a change in *Halcyon* might be, the possibility of applying 50 different contribution rules would create extreme confusion. This Court has repeatedly stressed that in maritime matters there must be uniformity in the rules applied, regardless of where the case is brought.[65] As the Court said in *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149, 160 (1920):

> The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations.

Even more to the point, the Court in *Pennsylvania R.R. Co.* v. *O'Rourke, supra,* 344 U.S. at 337, specifically rejected the idea that a state could enact statutes governing compensation for injuries on navigable water, and in *Italia Societa* v. *Oregon Stevedoring Co., supra,* 376 U.S. at 324, it rejected state law precepts because

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[65] *E.g., Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255, 259 (1922); *Chelentis* v. *Luckenbach S.S. Co.,* 247 U.S. 372, 384 (1918); *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 215 (1917).

the suit was for indemnification based upon a maritime contract, "governed by federal law." [66]

Nothing could be more destructive of federal uniformity in the maritime field than the result sought by Atlantic. In the present case, for example, if the accident had happened on the New York rather than the New Jersey side of the New York harbor, New York law would have denied Atlantic any right to contribution because of the absence of a joint judgment. New York Civil Practice Law and Rules, § 1401. An accident happening on different sides of the same navigable waters would thus lead to disparate conclusions on the right of a party to contribution and to great confusion in an area of the law which uniquely calls for harmony and uniformity. Not only do state laws vary widely (see Prosser, *Law of Torts*, 275 *et seq.* (3d ed. 1964)), but many actions would enmesh the federal courts in troublesome disputes as to the location of accidents-in-transit for purposes of determining which state law controlled, and all of the current problems with the application of conflicts of law would be introduced into a large number of suits.

Finally, both the District Court and the Court of Appeals concluded, after a review of New Jersey law, that state law would not permit contribution here. A-91-92, 99.[67] Both courts are "constantly required to

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[66] See also *Moragne* v. *States Marine Lines, Inc.*, *supra*, 398 U.S. at 401-402; *Seas Shipping Co.* v. *Sieracki*, *supra*, 328 U.S. at 88 (and cases there cited); *Pope & Talbot, Inc.* v. *Hawn*, *supra*, 346 U.S. at 409-411; *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*.

[67] The District Court and Court of Appeals both cited and relied on a 1954 decision of the New Jersey Appellate Division, *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954). It should be noted that that case has been

pass upon" New Jersey law questions, and, under traditional policies of this Court, their judgment should not be disturbed.[68]

CONCLUSION

The decisions below have produced a just and fair result. Benazet, injured by Atlantic's boxcar, has been fully compensated and is now back on the job.[69] Atlantic, found negligent, has not been permitted to pass the burden of its wrongdoing on to Erie. As the District Court specifically found, "* * * Atlantic was either the cause or knew or should have known of the defects in the brackets of the car it placed in commerce and * * * there was no superceding cause of the accident." A-81.

Like the shipowner in *Halcyon,* Atlantic here seeks a sweeping change in national maritime principles in order to "relieve itself of a part of its burden in this particular lawsuit." 342 U.S. at 286. It thereby ignores the fact that this Court's decisions have developed a comprehensive, efficient and familiar system for compensating shipboard injuries and allocating

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specifically cited with approval by the New Jersey Supreme Court. *Wellenheider* v. *Roder,* 49 N.J. 1, 5, 227 A.2d 329, 333 (1967). For a clear discussion of the reasons why New Jersey law would not allow contribution, see Judge Cooper's opinion below. A-91-92 n. 4.

[68] *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701, 707-708 (1949).

[69] Through an understandable confusion over "Defendant" and "Third Party Defendant," Defendant's Exhibit A was mistakenly included in the Appendix instead of Third Party Defendant's Exhibit A. The correct exhibit, with Atlantic's permission, has been appended as Appendix B to this Brief. It shows the salary paid by Erie to Benazet for each month from January 1962 through March 1970.

losses therefrom. This system should not now be overthrown, particularly on the facts of a case whose maritime character was not recognized until too late accurately to formulate and present to the jury all of the pertinent issues.

What the Respondent in *Halcyon* told the Court nineteen years ago—and with which the Court apparently agreed—is even truer now than it was then:

> We suggest that judicial legislation * * * can lead only to chaos. If the scheme of things is to be changed, Congress should legislate. Piece by piece judicial legislation cannot solve the problem satisfactorily.[70]

We respectfully urge the Court to affirm the judgment below and leave the issue of contribution where the Court originally and correctly placed it: with the Congress.

Respectfully submitted,

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[70] Brief for Respondent, *Halcyon Lines & Vinke & Co.* v. *Haenn Ship Ceiling and Refitting Corp.*, Oct. Term 1951, No. 62, p. 17. Similarly, this Court in *Reed* v. *The Yaka*, *supra*, emphasized that many of the decisions discussed above "have been left unchanged by Congress." 373 U.S. at 414.

APPENDIX A

88TH CONGRESS
1ST SESSION

S. 555

IN THE SENATE OF THE UNITED STATES
January 28 (legislative day, January 15), 1963
MR. BARTLETT introduced the following bill; which was read twice and referred to the Committee on Commerce

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A BILL

To unify apportionment of liability in cases of collision between vessels, and in other maritime casualties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, where a collision or other maritime casualty occurs, the compensation due for damages arising therefrom shall be settled in accordance with the following provisions:

SEC. 2. If the casualty occurs without fault, if it is caused by force majeure, or if the causes of the casualty cannot be determined, the damages shall be borne by those who have suffered them.

SEC. 3. If the casualty is caused by the fault of only one vessel, liability to make good the damages shall attach to the one which has committed the fault.

SEC. 4. (a) If the casualty is caused by the fault of two or more vessels, the liability to make good the damages shall be in the same proportion as the degree of fault: *Provided,* That if it is not possible to establish the degree of respective fault, or if it appears that the faults are equal, the liability shall be apportioned equally.

(b) In respect of damages caused by death or personal injury, liability shall be joint as well as several. When a vessel pays a larger part than that which in accordance with the provisions of subsection (a) hereof she ought ultimately to bear, she shall have the right of contribution for the excess.

(c) The damages to vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board shall be borne by the vessels in fault in accordance with the provisions of subsection (a) hereof without joint and several liability toward third parties and without right of contribution.

SEC. 5. The liability imposed by the preceding sections shall attach, in cases where the casualty is caused by the fault of a pilot, even when the carrying of a pilot is compulsory.

SEC. 6. The right of action for the recovery of damages resulting from a casualty shall not be conditional upon the entering of a protest or the fulfillment of any other special formality.

SEC. 7. The provisions of this Act shall not affect the liability under a contract of carriage or any contract; nor shall such provisions be construed as imposing any liability from which there is exemption by any contract or by any provision of law, or as affecting the right to limit liability in the manner provided by law.

SEC. 8. (a) Actions for the recovery of damages shall be barred after an interval of two years from the date of the casualty.

(b) Actions to enforce the right of contribution allowed by subsection (b) of section 4 shall be barred after an interval of one year from the date of payment.

(c) The court in which such actions are brought may extend such interval if it shall be satisfied that during such

period there had not been any reasonable opportunity of arresting the vessel involved within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business.

SEC. 9. This Act shall apply to the liability to make good the damages caused or contributed to by any fault of a vessel even if no collision has actually taken place.

SEC. 10. This Act shall apply to the liability to make good the damages in all cases to which the admiralty and maritime jurisdiction of the United States extends. The liability to make good the damages shall be in the same proportion as the degree of fault respectively committed and shall apply in the same manner between any vessel or vessels and the owners or operators of any land structure, facility, or other property, or between other persons, as the rule is applied between vessels.

SEC. 11. This Act shall apply to actions in personam as well as to actions in rem.

SEC. 12. The last sentence of section 1 of the Act of September 4, 1890 (26 Stat. 425 (33 U.S.C. 367)) is hereby repealed.

SEC. 13. This Act may be cited as the "Collision Liability Apportionment Act, 1963". It shall apply only to causes of action arising after the date of its approval.

APPENDIX B

Third Party Defendant's Exhibit A

T. H. Benazet

Employee No. 46428

Social Security No. 150-16-1959

	1962	1963	1964	1965	1966
January	673.32	585.53	512.45	—	612.31
February	516.52	377.06	520.50	18.72	516.62
March	624.04	452.40	450.20	—	526.03
April	475.51	470.36	487.96	—	558.30
May	585.11	492.21	535.95	—	608.46
June	451.36	479.35	480.83	—	504.90
July	571.82	155.26	561.70	98.56	602.81
August	406.16	487.96	51.21	521.90	516.62
September	407.52	443.60	—	606.98	621.70
October	523.84	444.51	11.60	568.62	597.38
November	418.77	467.10	—	562.09	635.51
December	432.46	465.78	—	616.55	656.44
	6,086.43	5,321.12	3,612.40	2,993.42	6,957.08

	1967	1968	1969	1970
January	586.06	499.85	738.67	1,015.49
February	623.15	858.32	644.24	645.80
March	786.73	582.30	656.30	400.61
April	591.98	533.65	629.83	
May	602.03	620.43	693.72	
June	589.97	549.98	698.16	
July	642.78	613.33	768.59	
August	604.78	640.55	751.79	
September	641.16	654.34	1,113.04	
October	727.14	861.31	769.47	
November	634.24	716.78	808.52	
December	737.12	974.55	852.79	
	7,767.14	8,125.39	9,125.12	2,061.90

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 13 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BENAZET,

Respondents.

REPLY BRIEF FOR PETITIONER

DEVEREUX MILBURN,
2 Wall Street
New York, New York 10005,
Attorney for Petitioner Atlantic Coast Line Railroad Company.

Of Counsel

LOUIS L. STANTON, JR.
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April 12, 1972

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IN THE

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ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BENAZET,

Respondents.

REPLY BRIEF FOR PETITIONER

1. This Court should establish a right of contribution in maritime non-collision cases without regard to Congressional failure to enact such a statutory right.

It is conceded that this Court has the *power* to establish a right of contribution in this case. In *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970) this Court emphasized the *wisdom* of establishing a maritime right in the absence of Congressional action and even in the face of current Congressional activity:

> "Respondents point out that a bill has been introduced in the United States Senate, by request, which would, among other things, extend the Death on the High Seas Act to include deaths in state territorial waters. S. 3143, 91st Cong., 1st Sess. To date no hearings have been scheduled or other action taken on the

bill. The mere possibility of future legislation in this field does not, of course, affect the legal merits of petitioner's claim that the rule of *The Harrisburg* is no longer a valid part of maritime law. See *United States* v. *W.M. Webb, Inc.*, 397 U.S. 179, 194 n. 21 (1970).

"Nor do we think that Congress' failure to take action on the pending bill, or to pass a similar measure over the years as the law of deaths on territorial waters became more incongruous, provides guidance for the course we should take in this case. To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.' *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963)." Id., at 405, n. 17.

No bills introduced in Congress in the twenty years since the *Halcyon*[1] decision would apply to a case such as this. S. 555 (Respondent's brief, Appendix A), although it is directed towards establishing rules for apportionment of damages in an instance of "collision or other maritime casualty", appears to deal with the obligations of two or more vessels among each other and the proportional allocation of liability between them according to fault.[2] (See S. 555, Section 4(a).)

No implication adverse to the wisdom of this Court's establishing a right to contribution in this case should be

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[1] *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952).

[2] This is the question which the Court now has before it in *Union Oil Company of California* v. *The Tugboat San Jacinto*, No. 71-900.

drawn from the absence of pressure upon Congress to overrule *Halcyon*.[3] As stated in our main brief, much of

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[3] Interestingly, the pressure which might have been directed towards overruling *Halcyon* was instead directed against the right of longshoremen and harbor workers to sue shipowners at all. H.R. 11267, which would have amended Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (the "Harbor Workers' Act") "to insure that employers will be immune for injuries for which compensation has been paid", was introduced in the 2nd Session of the 86th Congress on March 18, 1960 and referred to Committee. No further action was taken on the bill because the shipowners convinced the stevedores to abandon the bill and join the shipowners in a common effort to secure legislation eliminating third-party suits by harbor workers. Statement of Abraham E. Freedman, Esq. in Hearings on H.R. 207 before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries at 156, 87th Cong. 2d Sess. (1961).

H.R. 207, a bill which would have eliminated a shipowner's obligation of seaworthiness, was introduced on January 3, 1961 in the 1st Session of the 87th Cong. and was referred to Committee. Hearings were held on June 26-28, 1961 and February 20-21, 1962. Hearings on H.R. 207 before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 87th Cong., 1st Sess. (1961). Shipowners and stevedores testified in favor of the bill. See, *e.g.*, statement of J. Stewart Harrison, Esq., Hearings on H.R. 207 at 5. H.R. 207 was favorably reported with amendments by the full committee on March 27, 1962, with the title "A bill to restrict the liability of vessel owners and others in suits based upon the warranty of seaworthiness, and for other purposes". H. Rep. No. 1515, 87th Cong., 2d Sess. (1962). No further action was taken.

S. 2485, a bill to amend the Harbor Workers' Act to increase the benefits available thereunder, was introduced by Senators Yarborough and Morse in the 1st Session of the 90th Congress on September 29, 1967 and was referred to the Senate Labor & Public Welfare Committee. Hearings were held before the Subcommittee on Labor on November 16, 17, and 29, 1967, January 29 and 30, 1968 and February 19 and 20, 1968. Hearings on S. 2485 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st & 2d Sessions (1968). Representatives of the shipowners and stevedores testified in favor of the elimination of shipowners' liability for both unseaworthiness and negligence. See, *e.g.*, statement of Frank A. Scanlan, Esq., in Hearings on S. 2485 at 118. No further action was taken on the bill.

H.R. 14243, a companion bill to S. 2485, was introduced by Rep. Cohelan in the 1st Session of the 90th Congress on December 4, 1967 and was referred to the House Education and Labor Committee. No further action was taken on the bill.

the adverse effect of that decision has been eroded by *Ryan*[4] and the line of cases following it. The policy considerations behind this Court's development of maritime indemnity rights since *Halcyon* also apply to contribution. No reason remains for further deference to Congressional inactivity.

2. Contribution would harmonize rather than confuse existing maritime law.

The establishment of a right of contribution here would not "frustrate" this Court's decisions relating to the rights of longshoremen, shipowners and stevedores in maritime personal injury actions (Respondent's brief, pp. 17-30). Reliance is placed upon *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) for the principle that "a shipowner's obligation of seaworthiness cannot be shared with or delegated to other parties", and the assertion that contribution would be inconsistent with this principle. (Respondent's brief p. 21.)

This Court held in *Sieracki* that the shipowner's obligation is to compensate an injured harbor worker in full for injuries due to any unseaworthy condition. Once the shipowner has discharged this obligation, there is no reason to deny it the right to contribution from another party whose negligence contributed to the injury. Contribution will not dilute the shipowner's duty to maintain a seaworthy ship, any more than does the application of the implied warranty of workmanlike performance doctrine approved in *Ryan*.[4] The full and complete compensation of the harbor worker

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[4] *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

is not an issue in this case whether *Halcyon* be overruled or not.[5]

Contribution is not "fundamentally incompatible" with the obligation of seaworthiness imposed on, and indemnity rights accorded to, shipowners by the decisions of this Court. (Respondent's brief, p. 26.) In fact, recognition of a right of contribution would not affect these prior decisions in any way although contribution is a method of loss distribution preferable to the traditional indemnity theory developed in *Ryan* and succeeding cases. This Court need not reconsider or overrule these indemnity cases in deciding whether to award a right of contribution here. A worker's right to bring an action for unseaworthiness

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[5] Mr. Justice Black, the author of *Halcyon*, suggested that *Halcyon* furthered the interest of an injured longshoreman because it encouraged his employer to assist him in asserting his rights against third parties who might be liable to him. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 144-47 (1955) (dissenting opinion). At that time, the Harbor Workers' Act required the injured worker to choose between two options. He could (1) waive statutory compensation from his employer and sue the third party, or (2) accept statutory compensation, whereby his employer could sue the third party as a statutory assignee but was obliged to turn over to the employee any amount collected in excess of the amount of the statutory compensation. Justice Black reasoned that if a third party had a right to contribution from the employer, the latter would have no incentive to finance the employee's suit against the third party.

To the extent that rationale supported *Halcyon*, it is no longer valid. As Mr. Justice Black pointed out, *Ryan* removed the employer's incentive to assist his employee in cases where it applied. Moreover, Section 33 of the Harbor Workers' Act was amended in 1959 to allow an employee to sue a third party even though he had accepted statutory compensation. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391, *amending* 33 U.S.C. §933. This amendment made it unnecessary for the employee to choose between statutory compensation and a third-party action. Thereafter, the employee could use the statutory compensation to finance a third-party suit, and did not need to rely on the economic interest of his employer to do so for him.

under *Sieracki* would not be affected. If the worker recovers, the defendant could still assert any indemnity rights available under *Ryan* against the worker's employer or others. The question of contribution might never arise if such indemnity rights were available. Where the defendant is not entitled to indemnity, however, there is no reason to deny him the right of contribution from a third party if the negligence of both contributed to the worker's injury. The fact that the worker chooses to recover from a shipowner on a theory of unseaworthiness rather than negligence should not prevent a right of contribution if the conduct giving rise to unseaworthiness liability also constitutes negligence.

Ironically, here it is Erie who owned the float and owed plaintiff a duty of seaworthiness. Atlantic had no such absolute liability—Erie did. Erie is seeking to emerge scotfree from the litigation (as if that would promote rules of marine safety).

3. The Harbor Workers' Act does not preclude contribution.

The Harbor Workers' Act may exclusively control the relationship between Erie and plaintiff, but it has nothing to do with the relationship between Erie and Atlantic. It neither enlarges Atlantic's rights, nor diminishes them, as against Erie. The cause of action between them is "based on a separable legal entity of rights to be adjudicated."[6] The dollar amount in issue between them is established.

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[6] In *Dole* v. *Dow Chemical Co.*, the Court of Appeals of New York dealt with this situation (under the Workmen's Compensation Law) and with the division of responsibility according to fault. Its March 22, 1972 opinion (not yet reported) is attached hereto as Exhibit A.

The division of those damages must be decided between them—without reference to or control by the Act.

4. Erie has no potential right of indemnity from Atlantic:

The argument that Erie was passively negligent while Atlantic was actively negligent, with the result that Atlantic must indemnify Erie, is wholly without merit. Whether one party was actively negligent and the other passively negligent was not presented to the jury. The jury did find, however, that Erie was negligent and that its negligence contributed substantially to plaintiff's injury. (A. 62) It also found that Atlantic was negligent, but made no finding as to how "substantial" (if at all) its negligence was. (A. 61) Thus the facts do not support Erie's contention that it was less negligent than Atlantic. The car was in Erie's sole possession for three days before the accident, during which time Erie neglected its duty to inspect it and Atlantic could not possibly inspect it.

Respectfully submitted,

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April 12, 1972

APPENDIX

EXHIBIT A

Opinion of the Court of Appeals,
State of New York

Decided March 22, 1972.

(New York Law Journal, Tuesday, April 4, 1972)

Before:

Fuld, *Chief Judge;*

Burke, Scileppi, Bergan, Breitel, Jasen and Gibson,
Justices.

Bernice E. Dole, individually etc.,
Plaintiff,

—v.—

The Dow Chemical Company,
Defendant.

The Dow Chemical Company,
Third-Party Plaintiff-Appellant,

—v.—

McLeod Industrial Fumigators
& City Exterminators, Inc.,
Third-Party Defendant,

and

George Urban Milling Co.,
Third-Party Defendant-Respondent.

BERGAN, J.—Appellant Dow Chemical Company is defendant in an action for negligently causing the death of plaintiff's husband, and it is third-party plaintiff in a claim over against the husband's employer George Urban Milling Company. Another claim over by appellant against McLeod Industrial Fumigators & City Exterminators, Inc., is not involved in this appeal.

Dow is the manufacturer of chemicals. It produced Methyl Bromide, a penetrating and poisonous fumigant used for control of storage insects and mites. This product is labeled by Dow as poisonous, dangerous and highly volatile. Urban used it to fumigate a grain storage bin and shortly after fumigation it directed plaintiff's husband, its employee, to enter the fumigated bin to clean it. In doing this he was exposed to the poison which resulted in his death.

The negligence charged to Dow by plaintiff is that the poison was not properly labeled to warn users of its dangers; in failing to warn and instruct users that entry without protection into an enclosed area where the poison had been employed would be dangerous; and in failing to warn that use in an enclosed structure should be followed by effective dissipation of vapors or the lapse of time enough to allow dissipation.

Dow's answer to the complaint is both a denial of its own negligence and an allegation of affirmative negligence by decedent. Its third-party complaint against George Urban Milling Company alleges that the Methyl Bromide used by Urban was properly labeled with full warning of its dangerous nature; that it had furnished Urban with printed material relating to its use in fumigation and that Urban had access to and was aware of this material.

From this it is alleged by Dow that if decedent's death was caused by negligence it was the result of the "active and primary negligence" of Urban and the negligence of Dow "if any" was "merely passive and secondary."

The negligence of Urban is alleged by Dow to have been its improper precautions in fumigating with Methyl Bromide; in using for this work untrained personnel; in failing to follow instructions on the label and the literature available to it; in failing to test the premises after fumigation and to properly aerate it afterward. If plaintiff recovers Dow asks judgment over against Urban "for the full amount of such judgment."

Urban moved at Special Term to dismiss the third-party complaint as to it. This motion was denied. On Urban's appeal, the Appellate Division unanimously reversed and dismissed that pleading on the ground liability over would not be allowed if the plaintiff established that Dow's negligence in mislabeling and insufficient warning contributed to the accident.

This would be, the court noted, "active negligence of a character which would bar Dow from recovery against the user of the product" even though the user also was negligent. That view is consistent with decisions of this court (e.g., Jackson v. Associated Dry Goods Corp., 13 N. Y. 2d 112, 116; Colon v. Board of Educ. of City of N. Y., 11 N. Y. 2d 446, 451; Bush Term. Bldgs. v. Luckenbach S.S. Co., 9 N. Y. 2d 426, 430 et seq.; Putvin v. Buffalo Elec. Co., 5 N. Y. 2d 447; McFall v. Compagnie Maritime Belge, 304 N. Y. 314, 329-330).

The "active-passive" test to determine when indemnification will be allowed by one party held liable for negligence against another negligent party has in practice

proven elusive and difficult of fair application. The terms "primary" and "secondary" negligence, also used in the Dow pleading, have been regarded as more accurate and technically appropriate.

But the policy problem involves more than terminology. If indemnification is allowed at all among joint tortfeasors, the important resulting question is how ultimate responsibility should be distributed. There are situations when the facts would in fairness warrant what Dow here seeks—passing on to Urban all responsibility that may be imposed on Dow for negligence. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify indemnity on the basis of apportionment of responsibility between third-party plaintiff and third-party defendant.

The basic theoretical bar at common law to any apportionment among those who committed torts, either by indemnity or by contribution, was the unwillingness of the law as a matter of policy to make relative value judgments of degrees of culpability among wrongdoers (42 C. J. S., Indemnity, sec. 27[a], p. 606). The rule springs from the celebrated decision in Merryweather v. Nixan (101 Eng. Rep. 1337 [K. B. 1799]; see Reath, Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan, 12 Harv. L. Rev. 176-178; and note as to subsequent British and American treatment of the rule in 65 Col. L. Rev. 123, Toward A Workable Rule of Contribution, n. 2; and Allocation of Loss, 41 So. Cal. Rev. 728, 729, 730; and see general discussion by Prosser, The Law of Torts [4th ed.], addressed to contribution. [*sic*] indemnity and apportionment of damages, secs. 50, 51, 52).

Consistently with this theory at common law, the wrongdoer selected by the injured party for suit must have succeeded in avoiding any part of responsibility; and otherwise he would have to assume all of it without redress. This doctrine no longer is applied rigorously. For one thing the statute has altered the basic policy against contribution by allowing one joint tortfeasor subjected to judgment, to compel equal contribution by another who is subjected to the same judgment (CPLR 1401).

The effective application of this statute, depends, however, on the adjudication of joint tort responsibility which, as a matter of practice, depends in turn largely on the willingness or ability of the injured party to sue more than one of those responsible for his damage (see discussion of this aspect of the problem in Putvin v. Buffalo Elec. Co., 5 N. Y. 2d, p. 453, supra).

The "active-passive" negligence concept as it has developed in New York is itself an abandonment of the rigorous common-law policy; since it allows full indemnity in favor of one found to be passively negligent against another found to be actively negligent who could be brought into the action by the passively negligent party and required to answer the claim over.

This process in practical application became a measure of degree of differential culpability, although the degree was a large one. The "passive" negligent act was treated by the court as less a wrong than the "active" negligent act. The result has been that there has in fact emerged from the statutory change and from the judicial decisions an actual apportionment among those who participate responsibly in actionable torts.

This change in concept and the persistent criticism of the active-passive basis of apportioning liability between de-

fendants found responsible in negligence make it useful for the court to re-examine the basic fairness of the uncertain and largely unpredictable nature of the measure of redress that has been allowed by indemnity in favor of a party found negligent against another who played an effective role in causing the damage.

The conclusion reached is that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.

The adjudication is one of fact and may be sought in a separate action (cf. Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N. Y. 175) or as a separate and distinguishable issue by bringing in the third party in the prime action pursuant to CPLR 1007.

The procedural mechanism allowing a defendant to bring in a third party who may be liable to him "on all or part" of the plaintiff's claim (CPLR 1007, substantially taken from former Civ. Prac. Act, sec. 193[2]) was limited in Fox v. Western N. Y. Motor Lines (257 N. Y. 305) virtually to exclude the right of one charged with negligence to bring in another in a claim over. This was on the basis of the inability of one cast in damages to seek recovery over from another as a matter of law.

But Westchester Lighting Co. v. Westchester County Small Estates Corp. (278 N. Y. 175, supra) overruled the substantive basis of Fox by holding that such a claim for indemnity could be asserted in a separate action after judgment, and in a series of other cases the right to some

form of relief over has been sustained, including the theory of implied obligation to indemnify (McFall v. Compagnie Maritime Belge, 304 N. Y. 314, 328, supra), or breach of duty (p. 329), or the absence of a participes criminis relationship (Tipaldi v. Riverside Mem. Chapel, 273 App. Div. 414, 418, affd. 298 N. Y. 686).

It is fair to say that the rather widespread dissatisfaction with the inequity of result, as well as the looseness of terminology, in the "active-passive" axis foreshadowed for the Bar an attempt at realignment of the rule. This is to be observed both in some of the judicial opinions that have articulated the struggle toward fairness, and in professional commentaries.

In McFall v. Compagnie Maritime Belge (304 N. Y. 314, supra) the court permitted indemnity through recovery over by a charterer of a ship found negligent, among other things, in failing to warn stevedores in loading of its cargo known to be dangerous, of the peril in the loading (p. 327).

What seems decisive in the actual decision is that the "factual disparity between the delinquency" of the ship charterer and other defendants "is so great" that indemnity should follow, although the court employed "active" and "passive" negligence as operative terms (p. 330, opn. by Conway, Ch. J.).

The term "factual disparity" was referred to again in Putvin v. Buffalo Elec. Co. (5 N. Y. 2d 447, supra) by Chief Judge Conway in an analysis of McFall (supra) and the active-passive nexus (pp. 458-459).

This differential in quality of responsibility has been applied in a number of decisions tending to sustain the statement that there could be indemnity where a party "was less culpable than the principal wrongdoer, although both are equally liable to the person injured" (42 C. J. S.,

Indemnity, sec. 27[b], p. 606, and cases assembled under n. 30).

It has been observed that the doctrine of indemnity "evolved in the unnatural surroundings of an inflexible rule against contribution" and that courts have relied on "artificial distinctions" such as "active-passive" and misfeasance-nonfeasance" (65 Col. L. Rev. 123, 126, op. cit.).

In an analysis of the California rules affecting contribution and indemnity it was noted by Robert G. Werner (Contribution and Indemnity, 57 Cal. L. Rev. 490, 516): "As long as our present tort system is retained, an effective contribution and indemnity scheme is necessary to handle the growing problems created by multiple tort liability. . . . The present system runs counter to tort policy goals of deterrence, equitable loss sharing by all the wrongdoers, effective loss distribution over a large segment of society, and rapid compensation of the plaintiff—as well as the judicial economy interest in settling all matters arising out of the same transaction in one proceeding."

There is an analysis of the problem moving toward the use by courts of alternatives which will best implement "relevant tort goals" in 41 Southern California Law Review 728 (op. cit.). See, also, on the problem generally, Radoff, Perry J., Contribution Among Joint Tortfeasors (44 Texas L. Rev. 326); Rozell, William B., Contribution Among Joint Tortfeasors (52 Cornell L. Quarterly 407).

The problem of apportionment of responsibility for tort has engaged the attention of several New York State study authorities. In 1934, for example, the Commission on the Administration of Justice recommended the enactment of a comprehensive statute giving a right of contribution

among joint tortfeasors similar to the rights of co-obligors under contracts (N. Y. Negis. [*sic*] Doc, 1934, No. 50[d]).

One of the first studies made by the New York Law Revision Commission was on this subject (1936 Report, pp. 703-747), followed almost twenty years later by a further study in depth of the problem, and of the direction of decisional law (1952 Report, pp. 21-63).

The earlier study noted the refusal to allow contribution among joint tortfeasors was "of doubtful validity even in the most extreme case" (p. 720). The 1952 study observed what seems manifest in the willingness of the court to ameliorate an injustice by the "passive-active" concept, that essentially what had happened is the recognition by the court of a discernible "difference in the degree of wrong committed" (p. 54).

Fifty years ago Robert A. Leflar, a distinguished student of tort law, addressed himself to the closely related problems of indemnity and contribution as they were then developing (Contribution and Indemnity Between Tortfeasors, 81 U. of Pa. L. Rev. 130).

Although he then accepted the limitations on indemnity observed in contemporary law, Leflar argued for a much broader view of apportionment of responsibility among joint tortfeasors by contribution than the law at that time allowed. The reasons outlined apply fully to the question of apportionment between Dow and Urban now before the court. "This result [contribution] is admittedly inconsistent with the doctrine of contributory negligence and related rules; it causes the law to settle between litigants disputes arising out of their own misconduct. But the reasons given against adjudication of such disputes, at least as between joint tortfeasors, are of doubtful validity,

and are completely offset by the social evils which accrue from refusal to adjudicate the disputes. The deciding factor, then, should be fairness as between the parties" (81 U. of Pa. L. Rev., p. 159, op. cit.; see also Report of New York Law Revision Commission [1952], pp. 21-63, op. cit.).

The problem of apportioning liability between third-party plaintiff and third-party defendant in the present case requires consideration of the fact plaintiff represents the estate of the third-party defendant's employee and so no recovery could be had in an action brought by her against the employer or, indeed, by "anyone otherwise entitled to recover damages . . . on account of such injury or death" (Workmen's Compensation Law, sec. 11).

But she here asserts no such cause of action and the cause pleaded by Dow against Urban for indemnity is a very different kind of action. The relative responsibility of the employer and the chemical company for the wrongful death of the employee would be determined only in the action by the chemical company in which the cause asserted is based on a separable legal entity of rights to be adjudicated from the action by the administratix [*sic*] against it (Schubert v. Schubert Wagon Co., 249 N. Y. 253).

The theoretical difficulties have been resolved for this court by Westchester Lighting Company v. Westchester County Small Estates Corporation (278 N. Y. 175, supra), which sustained the right of plaintiff, a utility which had been found negligent in an action for causing the death of defendant's employee, to sue the employer on indemnity for having directly and negligently caused the death which, in turn, had compelled plaintiff to pay damages in an action by the employee's estate.

The difference between the causes of action and the parties pursuing them was decisive. "Plaintiff does not

sue for damages 'on account of' Haviland's death. Plaintiff asserts its own right of recovery for breach of an alleged independent duty or obligation owed to it by the defendant" (op. by Loughran, J., p. 179).

That is a precise description of Dow's third-party claim here. Chief Judge Crane, dissenting alone, felt that if the case were sustained, the liability of the employer should be limited "in amount" to its exposure under the Workmen's Compensation Law (p. 185), but this was a view not accepted by the court.

The problem would not arise in such cases as Bush Terminal Buildings v. Luckenbach S.S. Co. (9 N. Y. 2d 426, supra), Colon v. Board of Education of City of N. Y. (11 N. Y. 2d 446, supra) or Jackson v. Associated Dry Goods Corp. (13 N. Y. 2d 112, supra), where employees were not involved, but it would be relevant in such cases as Putvin v. Buffalo Elec. Co. (5 N. Y. 2d 447, supra) and McFall v. Compagnie Maritime Belge (304 N. Y. 314, supra), where indemnity against employers for injury or death for employees was considered. But in either type of case the issues require separate determinations.

Although, as in Westchester Lighting Company (278 N. Y. 175, supra), the indemnity based on an apportionment of responsibility could be pursued in a separate action by the party cast in damages, there should be no major difficulty in keeping apart the separable issues of liability of the defendant to the plaintiff and of the third-party defendant to defendant-third-party plaintiff in the same trial.

Whether the causes are tried together or separately would rest in the court's discretion, according to the requirements of fairness in the judicial management of the

case. One or both actions could, on stipulation of the parties, be tried by the court.

If tried together before a jury, the instruction would be to consider the third-party plaintiff's cause over only if that party were found negligent; and if that were found, indemnity would depend on the proportion of the blame found against third-party defendant. There might, of course, be a finding leading to no indemnity or to full indemnity.

Where, however, there has been an apportionment of liability based on indemnity between a third-party plaintiff and third-party defendant and the apportionment is not equal, there should not thereafter be a further contribution between them pursuant to CPLR 1401. In authorizing equally shared contribution among tortfeasors jointly found liable, this statute did not contemplate an apportionment already made in the judgment, and the "joint" responsibility described was not one of indemnity.

Right to indemnity, then, as among parties involved together in causing damage by negligence, should rest on relative responsibility and may be apportioned on the facts.

The order of the Appellate Division should be reversed, with costs to abide the event, and the order at Special Term reinstated.

Order reversed, with costs to abide the event, and the order of Special Term reinstated. Opinion by *Bergan, J.* All concur except *Burke* and *Scileppi, JJ.*, who dissent and vote to affirm.

ATLANTIC COAST LINE RAILROAD CO. *v.* ERIE LACKAWANNA RAILROAD CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 71-107. Argued April 17-18, 1972—Decided May 15, 1972

442 F. 2d 694, affirmed. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282.

Devereux Milburn argued the cause for petitioner. With him on the briefs were *Louis L. Stanton, Jr.*, *Jerome L. Getz*, and *Frank G. Kurka*.

E. Barrett Prettyman, Jr., argued the cause for respondents. With him on the brief for respondent Erie Lackawanna Railroad Co. were *Timothy J. Bloomfield* and *Lloyd W. Roberson*.

PER CURIAM.

We granted certiorari to review the judgment of the Court of Appeals for the Second Circuit, 442 F. 2d 694 (1971), affirming the judgment of the District Court for the Southern District of New York, 315 F. Supp. 357 (1970). 404 U. S. 909 (1971). We agree that in this noncollision admiralty case the District Court properly dismissed petitioner's third-party complaint for contribution against respondent Erie on the authority of *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282 (1952). The judgment of the Court of Appeals is therefore

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.